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25-5-2
No. 12053

United States
Court of Appeals
for the Ninth Circuit

JULIUS WILD,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

(In Two Volumes)

VOLUME I.

(Pages 1 to 264, Inclusive)

Appeal from the United States District Court
for the Northern District of California,
Southern Division.

FILED
JAN 14 1949

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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San Francisco, California,

Attorney for Defendant and Appellant.

FRANK J. HENNESSY,

United States Attorney,
Northern District of California,

Post Office Building,
San Francisco, California,

Attorney for Plaintiff and Appellee.

In the District Court of the United States for the
Northern District of California,
Southern Division

No. 31255 H

UNITED STATES OF AMERICA,

against

JULIUS WILD,

INDICTMENT

(Sec. 145 (b), Internal Revenue Code;
26 U.S.C., 145 (b))

The grand jury charges:

That on or about the 15th day of March, 1942, in the Northern District of California, and within the jurisdiction of this Court, Julius Wild, late of Redwood City, who during the calendar year 1941 was married and had no dependents, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1941 by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of California, at San Francisco, a false and fraudulent income tax return wherein he stated that his net income for said calendar year, computed on the community-property basis, was the sum of \$3,398.50 and that the amount of tax due and owing thereon was the sum knew, his net income for the said calendar year, of \$270.66, whereas, as he then and there well

computed on the community-property basis, was the sum of \$9,137.77, upon which said net income he owed to the United States of America an income tax of \$1,303.34.

(Sec. 145 (b), Internal Revenue Code; 26 U.S.C., 145 (b). [1*])

SECOND COUNT

The grand jury further charges:

That on or about the 15th day of March, 1943, in the Northern District of California, and within the jurisdiction of this Court, Julius Wild, late of Redwood City, who during the calendar year 1942 was married and had no dependents, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1942 by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of California, at San Francisco, a false and fraudulent income tax return wherein he stated that his net income for said calendar year, computed on the community-property basis, was the sum of \$5,176 and that the amount of tax due and owing thereon was the sum of \$964.72, whereas, as he then and there well knew, his net income for the said calendar year, computed on the community-property basis, was the sum of

* Page numbering appearing at foot of page of original certified Transcript of Record.

\$17,149.83, upon which said net income he owed to the United States of America an income tax of \$5,427.36.

(Sec. 145(b) Internal Revenue Code; 26 U.S.C., 145 (b)) [2]

THIRD COUNT

The grand jury further charges:

That on or about the 15th day of March, 1944, in the Northern District of California, and within the jurisdiction of this Court, Julius Wild, late of Redwood City, who during the calendar year 1943 was married and had no dependents, did wilfully and knowingly attempt to defeat and evade a large part of the income and victory tax due and owing by him to the United States of America for the calendar year 1943 by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of California at San Francisco, a false and fraudulent income and victory tax return wherein he stated that his net income, computed on the community-property basis, was the sum of \$4,201.82 and that the amount of tax due and owing thereon was the sum of \$829.78, whereas, as he then and there well knew, his net income for the said calendar year, computed on the community-property basis, was the sum of \$17,198.91, upon which said net income he owed to the United States of America an income and victory tax of \$5,919.80.

(Sec. 145(b) Internal Revenue Code; 26 U.S.C., 145 (b))

A True Bill.

JOHN F. MOTT,
Foreman.

FRANK J. HENNESSY,
United States Attorney.

(Approved as to form: R. B. McM.

[Endorsed]: Filed Feb. 18, 1948. [3]

District Court of the United States, Northern
District of California, Southern Division

At a stated term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 15th day of March, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable George B. Harris, District Judge.

[Title of Cause.]

ARRAIGNMENT

This case came on regularly this day for arraignment of defendant, Julius Wild, who was present with his attorney, Louis Ashe, Esq. E. H. Henes, Esq., Assistant United States Attorney, was present on behalf of the United States.

On motion of Mr. Henes, the defendant was called for arraignment. The defendant was informed as to the return of the Indictment by the

United States Grand Jury, and asked if he was the person named therein, and upon his answer that he was and that his true name was as charged, thereupon Mr. Belli waived the reading of the Indictment and advised that defendant had heretofore received copy thereof. Defendant stated that he understood the charge against him.

Ordered that this case be continued to March 29, 1948, to plead. [4]

District Court of the United States
Northern District of California,
Southern Division

At a stated term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 29th day of March, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable George B. Harris, District Judge.

[Title of Cause.]

PLEA OF "NOT GUILTY"

This case came on regularly this day for entry of plea of defendant, Julius Wild, who was present in proper person and with counsel, Louis Ashe, Esq. Reynold H. Colvin, Esq., Assistant United States Attorney, was present on behalf of the United States.

The defendant was called to plead and thereupon said defendant pleaded "Not Guilty" to the Indictment filed herein against him, which said plea was ordered entered. Defendant requested trial by jury. Ordered that this case be continued to May 25, 1948, for trial. (Jury) [5]

District Court of the United States
Northern District of California,
Southern Division

At a stated term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 10th day of August, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable George B. Harris, District Judge.

[Title of Cause.]

MINUTES OF TRIAL

This case came on regularly this day for trial of defendant, Julius Wild, who was present with his attorneys, Melvin Belli, Esq., and Louis Ashe, Esq. Robert B. McMillan, Esq., Assistant United States Attorney, was present on behalf of the United States. Walter M. Campbell, Jr., Esq., Regional Attorney for the Collector of Internal Revenue, was also present. Thereupon the following named

persons, viz: Grace F. Bridges, Charles P. Maletton, Mrs. Augusta Balch, Grant S. Morris, Benjamin T. Benson, John H. Shelly, Mrs. Anna B. Roan, Henry T. S. Johnson, Jr., Thomas M. Jackson, Clarence C. Bailey, James H. Booker, Mrs. Audrey Allen, twelve good and lawful jurors, were, after being duly examined under oath, sworn to try the issues joined in this case.

The hour of adjournment having arrived, and the Court having duly admonished the jury herein, it is Ordered that the further trial of this case be continued to August 11, 1948, at 10 a.m. [6]

District Court of the United States
Northern District of California,
Southern Division

At a stated term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 11th day of August, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable George B. Harris, District Judge.

[Title of Cause.]

MINUTES OF TRIAL

The parties hereto and the jury impaneled herein being present as heretofore, the further trial of this case was this day resumed. Mr. McMillan made

an opening statement to the Court and jury. Angelo Triedmoe, Julius Krakauer, were sworn and testified on behalf of the United States. Mr. Campbell introduced in evidence and filed U. S. Exhibits Nos. 1 to 9 inclusive. Mr. Belli introduced in evidence and filed Defendant's Exhibit B.

The hour of adjournment having arrived, and the Court having duly admonished the jury herein, it is ordered that the further trial of this case be continued to August 12, 1948, at 10 o'clock a.m. [7]

District Court of the United States
Northern District of California,
Southern Division

At a stated term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 12th day of August, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable George B. Harris, District Judge.

[Title of Cause.]

MINUTES OF TRIAL

The parties hereto and the jury impaneled herein being present as heretofore, the further trial of this case was this day resumed. Julius Krakauer was recalled for further testimony. Chester J. Lippert,

Wm. R. Burkett and Hubert Mytinger were sworn and testified on behalf of the United States. Mr. Campbell introduced in evidence and filed U. S. Exhibits Nos. 12 and 13. Mr. Belli introduced in evidence and filed Defendant's Exhibits C and D. Thereupon the Government rested its case. Mr. Belli made an opening statement to the Court and jury on behalf of the defendant. Robert E. Hughes was sworn and testified for the defendant.

The hour of adjournment having arrived, and the Court having duly admonished the jury herein, it is Ordered that the further trial of this case be continued to August 13, 1948, at 2 o'clock p.m. [8]

District Court of the United States
Northern District of California,
Southern Division

At a stated term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 13th day of August, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable George B. Harris, District Judge.

[Title of Cause.]

MINUTES OF TRIAL

The parties hereto and the jury impaneled herein being present as heretofore, the further trial of this

case was this day resumed. Robert E. Hughes was recalled and further testified for the defendant. Robert F. Callahan, Samuel Zeman, Harry I. Hicks were sworn and testified on behalf of defendant. Mr. Belli introduced in evidence and filed Defendant's Exhibits E, G, H, I. Mr. Campbell introduced in evidence and filed U. S. Exhibit No. 15.

The hour of adjournment having arrived, and the Court having duly admonished the jury herein, it is Ordered that the further trial of this case be continued to August 17, 1948, at 10 o'clock a.m. [9]

District Court of the United States
Northern District of California,
Southern Division

At a stated term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 17th day of August, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable George B. Harris, District Judge.

[Title of Cause.]

MINUTES OF TRIAL

The parties hereto and the jury impaneled herein being present as heretofore, the further trial of this case was this day resumed. Jos. Sammut, Emma M. Wild and Julius Wild were sworn and testified on

behalf of the defendant. Mr. Belli introduced in evidence and filed Defendant's Exhibit L.

The hour of adjournment having arrived, and the Court having duly admonished the jury herein, it is ordered that the further trial of this case be continued to August 18, 1948, at 10 o'clock a.m. [10]

District Court of the United States
Northern District of California,
Southern Division

At a stated term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 18th day of August, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable George B. Harris, District Judge.

[Title of Cause.]

MINUTES OF TRIAL

The parties hereto and the jury impaneled herein being present as heretofore, the further trial of this case was this day resumed. Julius Wild was recalled and further testified in his own behalf. William Burkett was recalled and further testified on behalf of defendant. A. L. Bougher was sworn and testified for defendant. Julius Krakauer was recalled by the defendant for further cross-examination. Mr. Belli introduced in evidence and filed

Defendant's Exhibit M. Mr. Campbell introduced in evidence and filed U. S. Exhibit No. 17.

The hour of adjournment having arrived, and the Court having duly admonished the jury herein, it is ordered that the further trial of this case be continued to August 19, 1948, at 10 o'clock a.m. [11]

District Court of the United States
Northern District of California,
Southern Division

At a stated term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 19th day of August, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable George B. Harris, District Judge.

[Title of Cause.]

MINUTES OF TRIAL

The parties hereto and the jury impaneled herein being present as heretofore, the further trial of this case was this day resumed. Julius Krakauer was recalled for further cross-examination. Emma Wild and Julius Wild were recalled and further testified on behalf of defendant. Mr. Belli introduced in evidence and filed Defendant's Exhibit O. Thereupon the defendant rested. William Burkett and Samuel Zemon were recalled and further testified on behalf

of the United States, in rebuttal. The Government then rested its case.

After hearing the opening argument of Mr. Campbell to the jury, and the hour of adjournment having arrived, and the Court having duly admonished the jury herein, it is ordered that the further trial of this case be continued to August 20, 1948, at 10:30 a.m. [12]

District Court of the United States
Northern District of California,
Southern Division

At a stated term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 20th day of August, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable George B. Harris, District Judge.

[Title of Cause.]

MINUTES OF TRIAL AND VERDICT
OF JURY

The parties hereto and the jury impaneled herein being present as heretofore, the further trial of this case was this day resumed. Mr. Belli made his argument to the jury. Mr. Campbell made his closing argument to the jury.

After the arguments of counsel and the instruc-

tions of the Court, the jury retired at 4:26 p.m. to deliberate upon its verdict. At 6:22 p.m. the jury returned into Court and upon being asked if they had arrived at a verdict, replied that they had and presented the following verdict which was ordered filed and recorded, viz:

“We, the jury, find as to the defendant at the bar as follows:

Guilty as to the 1st Count of the Indictment

Guilty as to the 2nd Count of the Indictment

Guilty as to the 3rd Count of the Indictment

HENRY T. S. JOHNSON, JR.,
Foreman.”

The jury upon being asked if said verdict as recorded was its verdict, each juror replied that it was. It is ordered that the jury be discharged from further consideration of this case [13] and from attendance upon the Court until notified.

Mr. Ashe then made a motion for new trial and motion for judgment of acquittal, notwithstanding the verdict, which motions were ordered denied. Mr. Ashe then made a motion for probation on behalf of defendant and for a pre-sentence investigation, which motion was referred to the Probation Officer of this Court for investigation and report.

Ordered that this case be continued to September 20, 1948, at 2 o'clock p.m. for pronouncing of judgment. On motion of Mr. Ashe, it is further ordered that the defendant remain at large on the bond heretofore filed. [14]

[Title of District Court and Cause.]

VERDICT

We, the Jury, find as to the defendant at the bar as follows:

Guilty as to the 1st Count of the Indictment.

Guilty as to the 2nd Count of the Indictment.

Guilty as to the 3rd Count of the Indictment.

HENRY T. S. JOHNSON, JR.,
Foreman.

[Endorsed]: Filed Aug. 20, 1948. [15]

District Court of the United States
Northern District of California,
Southern Division

At a stated term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 20th day of September, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable George B. Harris, District Judge.

[Title of Cause.]

SENTENCE

This case came on regularly this day for the pronouncing of judgment upon the defendant, Julius Wild, who was present in proper person and with his attorneys, Melvin Belli, Esq., and Louis Ashe,

Esq. Robert B. McMillan, Esq., Assistant United States Attorney, was present on behalf of the United States. G. Albert Wahl, Probation Officer, was present.

The defendant was called for judgment. Due consideration having been had on the report of the Probation Officer, it is Ordered that the defendant be denied probation. After hearing the defendant and the attorneys, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant, Julius Wild, for the [16] offense of which he stands convicted on his plea of Not Guilty and the verdict of the jury of guilty of the offense charged in the **Indictment** filed herein against him, be and he is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years on each of Counts One, Two and Three of the Indictment, said terms of imprisonment to run concurrently.

It Is Further Ordered that said defendant pay a fine to the United States of America in the sum of five thousand dollars (\$5,000.00) on Count One of the Indictment.

It Is Further Ordered that said defendant pay

costs of prosecution in the sum of seventy dollars and twenty-two cents (\$70.22).

It Is Ordered that judgment be entered herein accordingly.

It Is Further Ordered that the Clerk of this Court deliver a certified copy of the judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

The Court recommends commitment to a special type institution, as Medical Center, Springfield, Missouri.

Counsel for defendant made a motion for stay of execution of judgment for period of one (1) week, which motion was ordered denied. Further ordered that said defendant be held in the County Jail in San Francisco, California, pending commitment as aforesaid. [17]

District Court of the United States for the Northern
District of California, Southern Division

No. 31255 H

UNITED STATES OF AMERICA

v.

JULIUS WILD.

JUDGMENT AND COMMITMENT

On this 20th day of September, 1948, came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of violation (Sec. 145(b), Internal Revenue Code; 26 U.S.C., 145(b) defendant unlawfully and wilfully attempted to defeat and evade income taxes due the United States of America for the calendar years 1941, 1942 and 1943, as charged in the Indictment Three Counts and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years on each of Counts One,

Two and Three, said sentences to run concurrently.

It Is Further Ordered that said defendant pay a fine to the United States of America, in the sum of five thousand dollars (\$5,000.00) on Count One of the Indictment.

It Is Further Ordered that said defendant pay costs of prosecution in the sum of seventy dollars and twenty-two cents (\$70.22).

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

GEORGE B. HARRIS,
United States District Judge.

Examined by:

ROBERT B. McMILLAN,
Asst. U. S. Attorney.

The Court recommends commitment to a special type institution, as Medical Center, Springfield, Missouri.

JOHN E. SCHAEFFER,
Deputy.

Filed and entered this 28th day of September, 1948, C. W. Calbreath, Clerk.

Entered in Vol. 39, Judg. Book at Page 348. [18]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the Above-entitled Court:

Comes now Defendant in the above-entitled matter and appeals from the judgment of the Court, the Honorable George B. Harris presiding, and complying with Rule 37, Rules of Criminal Procedure, District Courts of the United States, represents that:

I.

Defendant is Julius Wild, of 1235 Whipple Road, Redwood City, State of California, and his attorney is Melvin M. Belli, Esq., of 240 Stockton Street, San Francisco, California.

II.

Defendant was charged by the Grand Jury on three counts alleging violation of Sec. 145(b), Internal Revenue Code, 26 U.S.C. 145(b).

III.

On the 20th day of September, 1948, a jury having theretofore returned a verdict on all three counts alleged by the Plaintiff, the Defendant was sentenced in said District Court by [19] the Honorable George B. Harris to a term of two years in the Federal Sanitarium at Springfield, Missouri, and fined the sum of Five Thousand Dollars.

IV.

Defendant, through his attorney, now appeals

from said judgment and all of it to the Circuit Court of Appeals for this District.

MELVIN M. BELLI,
Attorney for Defendant.

[Endorsed]: Filed Sept. 27, 1948. [20]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 20 pages, numbered from 1 to 20, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of United States of America vs. Julius Wild, No. 31255 H, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$8.00 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 26th day of October, A. D. 1948.

(Seal)

C. W. CALBREATH,
Clerk.

In the Southern Division of the United States
District Court for the Northern District of Cali-
fornia

Before: Hon. George B. Harris, Judge.

No. 31,255-H

UNITED STATES OF AMERICA

vs.

JULIUS WILD,

Defendant.

REPORTER'S TRANSCRIPT

Tuesday, August 10, 1948

Appearances: For the United States: Robert B. McMillan, Esq., Assistant United States Attorney, Walter M. Campbell, Jr., Esq. For the Defendant: Melvin Belli, Esq.

(A jury was duly impaneled and sworn to try the above-entitled cause, after which an adjournment was taken until tomorrow, Wednesday, August 10, 1948, at 10:00 o'clock a.m.) [1*]

Wednesday Morning Session, August 11, 1948
10:00 a.m.

The Clerk: United States v. Julius Wild, on trial.

Mr. McMillan: Ready.

Mr. Belli: Ready.

The Court: Is it stipulated that the jurors are present?

Mr. McMillan: So stipulated.

Mr. Belli: Stipulated.

The Court: You may proceed with the opening statement.

Mr. McMillan: At this time, may it please Your Honor, the Government presents its proposed instructions to the jury and I have a copy which I am handing to Mr. Belli, counsel for the defendant.

Mr. Belli: Didn't you give us a copy last night?

Mr. McMillan: No, we did not. Mr. Belli furnished us a copy a moment ago of the instructions requested by the defendant.

OPENING STATEMENT ON BEHALF OF THE UNITED STATES

Mr. McMillan: Ladies and gentlemen of the jury, at this time, at this stage of the case, it is not only appropriate, but it is indeed required by the Government to make an opening statement of the nature of this case and what it expects to prove in order to substantiate the charge made against the defendant, Julius Wild. It will necessarily be brief, rather sketchy. The purpose is simply to adequately inform you so that [2] you may move along with the evidence more understandingly as it comes in and as it may develop.

It should be kept steadily in sight, ladies and gentlemen of the jury, that statements by counsel at this time or any stage of the game by any counsel as to what the evidence is, is not the evidence itself. The evidence itself comes from the lips of the witnesses who are sworn to testify in this case and

from the documentary proof, the records which will be produced here for your inspection and examination; all evidence to be controlled and guided by the rulings of His Honor and the instructions which he will give you at the close of the case.

Now, the first count of this indictment charges that Julius Wild wilfully attempted to evade and defeat a large part of his individual income tax for the calendar year 1941 by filing a false and fraudulent income tax return wherein he alleged his net income was the sum of \$3398.50, and that he owed \$270.66 in taxes to the United States; whereas his actual net income on community property basis was \$9137.77, and he actually owed to the United States a total amount of \$1303.34. In other words, it is charged that the defendant wilfully attempted to evade and defeat payment of taxes for the calendar year 1941 by means of filing a false and fraudulent return; the amount which he wilfully attempted to defeat and evade payment of in the first count of the indictment is \$1032.68.

It is to be noted that mention has been made that this [3] return was on a community property basis. The Federal Statute recognizes the community property law, and under the community property law each spouse is entitled to make a separate return, make a return of half of the amount, and the other spouse makes a return on the other half. What is charged here concerns the half only of the defendant Julius Wild.

The second count charges that Julius Wild wilfully attempted to evade and defeat a large part of

his income tax for the calendar year 1942 by filing a false and fraudulent income tax return wherein he alleged his net income was \$5176, and that he owed income tax to the United States in the total amount of \$964.72; whereas the actual fact was that his net income was \$17,149.18 on a community property basis; that is, one-half of the income. He actually owed taxes to the United States in the total amount of \$5427.36. That is, Julius Wild is charged with having attempted to evade and defeat payment of income taxes for that year of 1942 the difference between \$5427.36 and the amount that he paid, \$964.72, being \$4462.64.

Now, the third count of the indictment is for the calendar year 1943 and it charges in that count that the defendant Julius Wild wilfully attempted to evade and defeat a large part of his individual income tax for the calendar year 1943 by filing a false and fraudulent income tax return wherein he alleged that his net income on the community property basis was the sum of \$4201.82, and that he owed \$829.78 in taxes to the [4] United States; whereas his actual income, taxable net income on a community property basis, was \$17,198.91, and he actually owed taxes to the United States in the total amount of \$5919.80. So that for the calendar year 1943 Julius Wild is charged with having attempted wilfully to evade and defeat payment of income taxes in the sum of \$5919.80.

Now, taking the three counts and adding them up, the total amount would be \$10,585.34 that he is charged with having attempted wilfully to evade

and defeat payment of. For easy recollection you can carry it as approximately \$10,500.

And as I have stated, being on a community property basis, the return for both of them would be just twice that amount; that is, \$21,000.

The evidence in this case which the Government will present, ladies and gentlemen, will show that the defendant Julius Wild, during the years here involved, 1941, 1942 and 1943 operated what is known as a bookie establishment at 1182 Market Street, San Francisco; that it was in the basement of the Marshall Square Building. That is where the Orpheum Theater is located. It was a gambling enterprise, engaged in betting on horseraces. The evidence will show that it was a very large enterprise, that he had a very large business for the three years involved, and he described it in the 1942 individual income tax return as a "brokerage business."

Now, it should be said at the outset, ladies and gentlemen, [5] that we are not concerned here in this case about this gambling business as being an illegal business. That is not our concern. The indictment charges simply and only an evasion and defeat, an attempt to evade and defeat payment of income taxes. We have nothing to do here with illegal gambling. But the income tax law does provide that it matters not from what source the income is obtained, whether from gambling or any illegal enterprise, income taxes must be paid. And in this case, notwithstanding that it was an illegal enterprise, income taxes had to be paid; but it is

to be borne in mind steadily that there is no charge of that kind here against the defendant of carrying on and conducting an illegal enterprise or business.

The witnesses which the Government will produce here to testify to the extent of the defendant's business and who will produce records, documentary proof showing his large income for the years stated and balancing up in the amounts set forth in the indictment will be former employees of Mr. Wild's. They worked there in this gambling enterprise.

The Government will produce the person who was responsible for the employees, who made up the books, who made up the entries. And the Government will in fact produce here the original cards of entries, the original records making up the accounts that were kept by this bookkeeper.

The testimony of the witnesses will show that a very large amount of money was handled in each week in this establishment [6] located at 1182 Market Street. It will show that the income was several times the amount set forth in the return of the defendant Julius Wild.

For example, the evidence will show that during the month of January 1941 the records showed the gross take was \$46,492, and during that month Wild make a taxable net profit of over \$1500.

For the year 1941 these records will show that the gross amount of money taken over the counter was over \$385,000 and the total taxable net profit was almost \$18,000.

For 1942 the evidence will show that the gross

take was approximately \$570,000 and that taxable net profit thereon was about \$35,000.

For 1943 the evidence will show that the gross take was over \$500,000, with net profit of \$30,000.

During the three year period Wild reported a total net profit of \$12,776.32.

Another employee of this bookie establishment to be produced here to give testimony and he will testify that the above mentioned records as I spoke of were those regularly maintained for Julius Wild to show his business profits, and that he, the employee, made entries on those records. He will testify that those records actually reflect the amount of money that was taken in and the expenses paid out.

The Government will show by the evidence in this case, [7] may it please Your Honor and ladies and gentlemen of the jury, that when the defendant Julius Wild filed these income tax returns that he knew that they were false and that he wilfully attempted to evade and defeat payment of these taxes.

In short, ladies and gentlemen of the jury, the Government intends to and will prove every material allegation of the indictment to a moral certainty and beyond a reasonable doubt. And so proving it, to that degree it confidently expects that you will return a verdict of guilty on each of the three counts.

Mr. Belli: May we reserve our opening statement, Your Honor, until just before we put on our defense?

The Court: You may, Mr. Belli.

Mr. Belli: And our instructions that I have handed two copies to the United States Attorney, may we hand to the Clerk?

The Court: Yes. You may proceed, Mr. McMillan.

ANGELO TVEITMOE

called as a witness on behalf of the United States, sworn.

The Clerk: Q. Will you state your name to the Court and jury?

A. Angelo Tveitmoe.

Direct Examination

Mr. Campbell: Q. What is your business or occupation, [8] Mr. Tveitmoe?

A. I am an employee in the office of the Collector of Internal Revenue.

Q. Is that the Collector of Internal Revenue for the First Collection District of California with principal offices in this city? A. Yes.

Q. And what is your title in that office?

A. I have been Chief of the Audit Section for a number of years.

Q. How long have you been Chief of the Audit Section?

A. Well, since it was inaugurated way back in about 1924, I think it was.

Q. Now, the Collector of Internal Revenue for the First District of California here in San Francisco is, is it not, the office designated by law to receive income tax returns of residents of this

(Testimony of Angelo Tveitmoe.)

vicinity? A. It is.

Q. Now, Mr. Tveitmoe, as Chief of the Audit Section, do you have access to and a measure of control over the official files and records of the Collector? A. We do.

Q. You have been asked to produce certain income tax returns heretofore filed with the Collector of Internal Revenue. I will ask you if you have produced a return filed by or on behalf of Julius Wild for the calendar year 1941. [9]

A. I have.

Q. Do you have that return here?

A. It is in my possession here.

Q. Will you state upon what date that return was filed with the Collector?

A. That return was filed in March——

Mr. Belli: That would appear on the face, wouldn't it?

Mr. Campbell: Yes, but I want it for the record.

The Witness: The return was filed March 10, 1942.

Mr. Campbell: Q. You have a photostatic copy of that? A. Yes, I have.

Mr. Campbell: I will show this to counsel.

I am going to offer as Government Exhibit No. 1 the return for 1941 of Julius Wild, 1182 Market Street, to which I desire to attach a photostatic copy with permission to withdraw the original at the end of the case.

The Court: So ordered.

(Testimony of Angelo Tveitmoe.)

(Income tax return of Julius Wild for the calendar year 1941 was received in evidence and marked United States Exhibit No. 1.)

Mr. Campbell: Q. Have you also produced the return of Julius Wild for the calendar year of 1942? A. This is it.

Q. And on what date was it filed?

A. This return was filed March 15, 1943. [10]

Q. You have also produced a photostatic copy of this return? A. Yes.

Mr. Campbell: This will be offered as Government Exhibit No. 2 in evidence to which I attach a photostatic copy and ask leave of the Court to withdraw the original at the termination of the trial.

Mr. Belli: So stipulated, Your Honor.

The Court: So ordered.

(Income tax return for the calendar year 1942 was thereupon received in evidence and marked United States Exhibit No. 2.)

Mr. Campbell: Q. Have you also produced the individual income tax return of Julius Wild for the calendar year 1943?

A. Yes, sir, and this return was filed March 15, 1944, and a photostat accompanies it.

Mr. Campbell: This will be offered as Government Exhibit 3 to which is attached a photostatic copy, and I ask leave of Court to withdraw the original at the termination of the trial.

The Court: So ordered.

(Testimony of Angelo Tveitmoe.)

(Income tax return for the calendar year 1943 was thereupon received in evidence and marked United States Exhibit No. 3.)

Mr. Campbell: Q. Have you also produced the returns filed by or on behalf of Emma Wild, the wife of Julius Wild? A. Yes. [11]

Q. Do you have the 1941 return?

A. Yes, I have the 1941 return.

Q. On what date was it filed?

A. It was filed on March 4, 1942, and there is a photostat, also, of that.

Mr. Belli: I may be premature in making the objection on this, Your Honor. We might hold it in reservation. However, I desire for the record at this time to object to the returns of the wife, even though they be community property returns, as not binding on Mr. Wild.

Mr. Campbell: May I inquire if the objection is on the basis of non-signature—?

Mr. Belli: No, if you tell me it is, I will accept it.

Mr. Campbell: It is.

Mr. Belli: All right.

Mr. Campbell: I offer this in evidence.

Mr. Belli: Objection thereto and exception.

The Court: It may be received and appropriately marked.

(Income tax return of Emma Wild for the calendar year 1941 was thereupon received in evidence and marked United States Exhibit No. 4.)

(Testimony of Angelo Tveitmoe.)

Mr. Campbell: Q. Have you also produced the return of Emma Wild, the wife of Julius Wild, for the calendar year 1942? A. Yes. [12]

Q. When was it filed?

A. It was filed February 22, 1943, and there is a photostat of that also.

Mr. Belli: Same objection.

Mr. Campbell: I make the offer of this return——

Mr. Belli: But stipulated it is an original, though.

Mr. Campbell: (Continuing): ——as Government Exhibit No. 5 and attach a photostat and ask leave to withdraw the original at the termination of the trial.

The Court: So ordered.

(Income tax return of Emma Wild for the calendar year 1942 was thereupon received in evidence and marked United States Exhibit No. 5.)

Mr. Belli: And may we have our objection note an exception, please, Your Honor?

The Court: Objection overruled and exception noted.

Mr. Campbell: Q. Have you also produced the return of Emma Wild for the calendar year 1943?

A. Yes, I have.

Q. What day was it filed?

A. March 15, 1944.

Q. You have a photostat of that?

A. This is it.

(Testimony of Angelo Tveitmoen.)

Mr. Campbell: This will be offered as Government Exhibit No. 6, the photostatic copy, and leave will be asked of the [13] Court to withdraw the original at the termination of the trial.

The Court: So ordered.

Mr. Belli: Same stipulation, same objection and exception.

The Court: Objection overruled and exception noted.

(Income tax for Emma Wild for the calendar year 1943 was thereupon received in evidence and marked United States Exhibit No. 6.)

Mr. Campbell: You may cross examine.

Mr. Belli: I have no questions.

Mr. Campbell: May this witness be excused?

The Court: Are there any questions?

Mr. Belli: No, Your Honor.

The Court: You may be excused.

JULIUS KRAKAUER

called as a witness on behalf of the United States, sworn.

The Clerk: Q. Will you state your name to the Court and jury?

A. Julius Krakauer.

Direct Examination

Mr. Campbell: Q. Mr. Krakauer, what is your present occupation?

(Testimony of Julius Krakauer.)

A. I am temporarily helping out in an office in an organization in which I have a small investment, because one of the [14] principals is ill.

Q. What is the name of that organization?

A. The Columbia School of Commercial Art. I haven't been there long enough and I am a little confused in the name.

Q. Are you acquainted with the defendant Julius Wild, Mr. Krakauer? A. Yes.

Q. For how long a period have you known him?

A. I knew him down in Texas before he came up here and before I came up here. Oh, I have known Julius Wild, probably 30-odd years. I wouldn't want to say exactly, though.

Q. Were you ever employed by the defendant Julius Wild? A. Yes, sir.

Q. And for what period of time?

A. Oh, around about 1936, I should say, to September 1943. Now, I am not sure of those dates because one forgets things. It was six or seven years anyway, I imagine.

Q. During the years 1941, 1942 and until September of 1943, were you employed by him?

A. Yes, sir.

Q. And at what location?

A. At 1182 Market Street, Marshall Square Building, ordinarily known as the Orpheum Building in those days.

Q. What was the nature of the business in which you were employed by him? [15]

(Testimony of Julius Krakauer.)

A. What is ordinarily known as a bookie joint, a bookie establishment.

Q. You refer to an establishment that accepts bets on horseracing? A. Yes.

Q. And in what part of the Marshall Square Building that you referred to at 1182 Market Street was this business devoted to?

A. A goodly portion of the basement.

Q. Was it located in that same portion of the building throughout the period 1941, 1942 and until September of 1943 when your employment terminated? A. Yes.

Q. Always at the same location?

A. Yes, sir.

Q. And you say you went to work for him in 1936? A. Yes.

Q. Prior to 1941 were you employed in the same type of business by him? A. Yes, sir.

Q. And was it at that same location?

A. My entire employment was at that same location.

Q. From 1936 until you left in September of 1943?

A. Yes, sir. However, I should like to amend that because it might come up, to this extent, at one time when there was "heat" on, as is known in the bookie trade, why, we occupied a [16] room upstairs in the same building and relayed bets downstairs, which portion of the establishment was closed at that time. I just want to put that in because that may come up.

(Testimony of Julius Krakauer.)

Q. When was that?

A. I wouldn't want to say.

Q. Was it during 1940?

A. It was prior to 1941, 1942 and 1943.

Q. It was prior to the period here in question?

A. Yes. [17]

Q. It was prior to the period here in question?

A. Yes.

Q. Will you state, briefly, the nature of your duties in connection with your employment by Mr. Wild in this bookie establishment, as you put it?

A. When I first went in there, I was purely a ticket writer——

Q. No, let us take the answer in question.

A. I was one of the ticket writers and also handled the funds and took care of them, took them, first, to the Number 1 Bank of America branch at Powell Street. No, it was then on the corner of Mason.

Q. What other duties did you have?

A. It was the Day and Night Bank and it took them in the evening—safe deposits, and brought them back in the morning, and accounted for them, and later on I was appointed to and kept the records of the establishment in the way of profits and losses and all other such.

Q. During the years 1941, 1942, and up until September of 1943, did you keep the records of the daily receipts and expenditures of the business?

A. Yes, sir.

Q. Will you state, for the benefit of the jury,

(Testimony of Julius Krakauer.)

Mr. Krakauer, approximately the size of the establishment there in the basement of the Marshall Square building? A. In floor space? [18]

Q. Yes, in the floor space.

A. Oh, probably fifty feet one way and a couple of 100 the other way. I never measured it.

Q. How was access gained to the basement? By stairs or elevator or both?

A. It had two entrances. You could come in by the elevator and enter what was known as the back office in front of the elevator; or there was another entrance via, or above the elevator discharge, where there were two doors. Then there was the regular customer entrance down the stairway and into the front end of the establishment.

Q. Was that entrance you refer to as the regular customer entrance from the lobby of the building or the street?

A. It was from the lobby of the building. You came off the street into the lobby and then down this stairway.

Q. Will you describe the equipment, that is to say, the furnishings of this establishment as it existed through 1941, 1942, and 1943.

A. Well, it was very spacious. It had chairs, comfortable chairs, tables, some round and some square; and it was very profuse in the information that it gave to customers in the way of bulletin boards.

Q. What do you mean by that?

A. All newspaper entries for the day, selections,

(Testimony of Julius Krakauer.)

and the copies of the Racing Form split, so the various pages, from page to [19] page, could be seen. That required several copies to split them—and all other information of that character that is usually, but not as profusely, displayed as in this establishment, because it was well known.

Q. Were there also counters?

A. Yes, there were counters. And as you came back, in the back of the office there was a counter with two ticket writers, one of which I was, in addition to the duties I spoke of a moment ago of performing.

Q. Was there also a cashier's cage?

A. Yes, there was.

Q. Were the ticket writers in the cage?

A. No, they were out in the middle on an apparatus which was hung with run-down sheets, giving the horses by number. You did not bet by name of horse, but by number.

Q. We will come to that in a moment.

A. Yes.

Q. You have spoken of information provided for customers. It is true there are a large number of publications printed and circulated concerning entries of horses in races at various tracks, and also a purported expert selections of probable winners in each race. Is that correct? A. Yes, sir.

Q. Were those various publications regularly subscribed to as a portion of the business provided to customers coming in [20] to the place of business to place bets?

(Testimony of Julius Krakauer.)

A. Not all of them, but a good many of them were, and were displayed on these bulleting boards simultaneously.

Q. Let me ask you this, preliminarily: How many days were you operating during the years 1941, 1942, and up until September of 1943 when you left?

A. Six days a week. Well, of course there were some days—I wouldn't say definitely it was always six days a week, because when the California tracks alone were operating, they didn't operate on Monday and we would only work the five days; but there were very few of those.

Q. Did you operate every day there were any tracks running in the United States?

A. Any days that the "Service," as we call it, gives information on which to work.

Q. We will come to that in a moment. Tell me now, in connection with the operation of the business during the years in question, was there "Service" utilized, whereby information pertaining to races being run at the various tracks including running information as to the progress of particular races and announcements of the winners of the races and the prices paid at the tracks, for bets, was publicly announced in any of the establishments?

A. Yes, sir.

Q. Will you describe the equipment used for that purpose, [21] that is to say, was there a loud speaker?

A. There was a loud speaker rented from an

(Testimony of Julius Krakauer.)

establishment. Well, I don't think it was an establishment, I think it was a personal business of an operator. If he rents these loud speakers to the various establishments engaged in this character of business.

Q. Was the loud speaker and its renting separate and distinct from the "Service," that is to say, the information that came in for dissemination over the loud speaker?

A. Yes, sir, entirely. They just give us the benefit of the running of the race and the results, you understand, over the loud speaker.

Q. As I understand you, one concern supplied the loud speaker, and another concern supplied the information for your broadcast over the loud speaker.

A. They were purely the mechanical end of it, that's right. [22]

Q. Yes, in connection with the loudspeaker, there was a wire service which supplied the information regarding these races? A. Yes, sir.

Q. That came in over something similar to a telephone wire, is that correct?

A. I imagine so. I was never in the establishment that furnished it, but I was once told that it came into the various mikes and that the establishment was divided up so as to handle the large volume of business.

Q. And no one in your establishment announced over that loud speaker? A. No.

(Testimony of Julius Krakauer.)

Q. As far as you know, it came from the outside?
A. Yes.

Q. In connection with the operation of the bookie establishment, let me ask you whether the operation of this particular establishment for the purpose of placing bets on horseraces, did the customers come to the place of business or were the bets obtained otherwise, that is to say, by solicitation, by telephone or personally?

A. They came in 98 per cent personally. There were a few phone customers that phoned in by special arrangement; but I should say probably 99½ per cent—I wouldn't want to name the percentage—but it was pretty near 100 per cent that came down there to place bets. [23]

Q. Are you able to state the average number of customers that would come to the establishment per day during the period in question, and when I refer to the "period in question," I am referring to the years 1941, 1942, and until September of 1943.

A. It is very hard to say, sir. It was a right active spot, and oh, I should say, 100, perhaps, maybe more. It is very difficult. I handled a good many of them myself. I imagine there were that many at least—maybe more—a minimum of 100.

Q. How many employees operated this place, or how many employees operated during the period here in question?

A. Well, there were two ticket writers.

(Testimony of Julius Krakauer.)

Q. By "ticket writers" do you refer to a person or persons who accepts bets?

A. The man who took the bets down at the instance of the customers.

Q. Yes. A. And there was a cashier.

Q. That is the person that pays out the winning bet?

A. That is the person that pays out the winning bet.

Q. Yes.

A. And then there was a man who allocated and distributed the bets, establishing the position of the book in each race.

Q. In other words, he would figure the odds to be paid on each bet? [24]

A. He would separate and pile them up. A good many of our customers made bets in advance, you understand. They would go and tend to their own business and they would place a considerable number of bets in the morning, and some would come in at noon and do that. We had a little case there in which the various races were numbered and we would put these cards in and distribute them. So when the races came up, they would be drawn out of the case and laid down with the bets that were currently made on that same race. We had to have that arrangement in order to keep the position of the book in each race accurately.

Q. What other employees did you have then?

A. There was this man that did that, and Mr.

(Testimony of Julius Krakauer.)

Wild at times, and there were some others there just temporarily.

Q. You also had a doorman, did you?

A. Pardon me, that's right, I forgot him. That is very important. We had a doorman.

Q. What were his duties?

A. His duties were to be very careful to see that the right people, as it were,—that is the nearest word description of it—came into the establishment.

Q. Will you relate, Mr. Krakauer, the steps that a customer would go through in placing a bet there? Tell us how it was placed and the handling of the bet, and assume in answering the question that the particular bettor was one of the lucky [25] ones who may have won on his particular bet.

A. Well, a customer would come in, a good many of them would assemble in groups around the tables and make selections, and when it was post time or near post time they would come up there, or some of them would come before we even opened, or on the street, would say, "Place these for me," and we would distribute those in the little case I spoke of. The customer would look at the run-down sheets which were suspended above the ticket writers' station, and you would enter the bet and the position which was "A" or "B" or "C", which was win, place or show; and the amount and the initial. All bettors—well, some used the full name, but we did not encourage that because it was difficult to write in the rush of business, and they all

(Testimony of Julius Krakauer.)

had initials, or at least the majority of them. Each ticket writer had a position for his money.

Q. At the time they placed the bet, they would hand you the money?

A. At the time they placed the bet, they would hand in the money, or exact change, and we put that in the cash box.

Q. You would mark on the ticket the horse on which they bet and also win, place or show?

A. That's right, and these tickets were stamped, and it made it easy for the ticket writer. There was a number for the horse and then "A", "B" or "C", and you just entered the amount of the bet, and win, place or show. [26]

Q. And there would be initials to identify the bettor?

A. There would be initials to identify the bettor in case he won.

Q. Assuming that the race had been run and the winning horse, win, place and show, had been announced over the radio. Let me ask you this: Was it your habit to pay the track odds; that is to say, the amount paid off on bets on races which were run?

A. There were some limits. Mr. Wild's limits, as a matter of advertising value and publicity value, were sometimes a little higher than those. Up to \$5 he would pay track odds. That, of course, would limit his liability. Some of the books would do that, and Mr. Wild was right liberal in that respect.

Q. Otherwise what would he pay?

(Testimony of Julius Krakauer.)

A. 15, 6 and 3.

Q. In other words, the limit would be 15-1 on the winning horse? A. Yes.

Q. 6 to 1 on the place horse? A. Yes.

Q. And 3 to 1 on the show horse?

A. That's right. Of course, that sometimes varied according to how the competitors were operating.

Q. But that was standard odds paid?

A. Standard odds paid. [27]

Q. Well, those were standard limits?

A. Yes.

Q. Otherwise the track odds would be paid?

A. Yes, otherwise track odds would be paid.

Q. If they were less than the limit?

A. Yes, sir.

Q. Now, we have come to the point where the bettors have placed the bets with the ticket writers and the tickets have been written out, and the results have been announced. Now, what was done next?

A. As I said a moment ago, before that we would get the money and each had a box in which to throw the tickets and immediately were picked up by the person I spoke of and he would distribute them for that race being currently run, and always a race forward of that, so that he would know what the position of the book was on a race in advance. Then, after the race was run, the piles of tickets that represented the winners were picked up and this person and Mr. Wild usually assisted in that,

(Testimony of Julius Krakauer.)

being very good at figures, would figure the amount due the bettor and turn them over to the cashier, who would begin to call the bettors' initials or names and they would be paid off.

Q. That is, if they were there at that time.

A. If they were there at that time, yes.

Q. What was the custom if the bettors were not there at that [28] time?

A. They would be held until evening and if any were left, then the money was put inside and paid out the next day if they appeared to claim their bets.

Q. We will come to those. Those are known as, occasionally, "sweepers," where they were not collected.

A. Well, they will develop into that. They are not known as that in the beginning.

Q. Well, we will come to that. A. O.K.

Q. You stated, Mr. Krakauer, during the years here in question, that you kept certain records, is that correct, sir? A. Yes, sir.

Q. Will you state generally, or describe generally, the type of record which was maintained there relative to receipts and disbursements of this business?

A. Well, previous to my having been placed in charge of that particular end of it, why,—

Q. No, I am referring to 1941, 1942 and 1943, what was the type of record which was maintained there relative to receipts and disbursements in this business?

(Testimony of Julius Krakauer.)

A. They were kept on black card the same size we used to take bets on.

Q. Was there an individual card written by each day relative to that day's business? [29]

A. Yes.

Q. Was it your habit to accumulate the totals from the preceding day, day to day?

A. Yes, sir.

Q. And were those totals then gathered together for any period of time? A. One week.

Q. In other words, what would be the weekly period? Would it be the calendar week?

A. It would be from Monday to Saturday night.

Q. From Monday to Saturday night.

A. Yes, a calendar week in that respect.

Q. You would start with a fresh card on Monday morning? A. Yes.

Q. And you would enter the receipts and disbursements for that day? A. Yes, sir.

Q. And on Tuesday, what was entered on the card?

A. There was a fixed overhead like forms, newspapers,—

Q. Yes.

A. (Continuing): —which we cut up and put up on the publicity board.

Q. We will come to specific items later, but were the receipts and disbursements on Tuesday entered on that card? A. Yes. [30]

Q. And were the totals from Monday carried forward on that card? A. Yes.

(Testimony of Julius Krakauer.)

Q. What would be done with the Monday card?

A. The Monday card and all cards for that week would be kept until Saturday. Then there was a final card made on Saturday and the other five cards were destroyed. They had no further value, naturally, because the accumulation was carried forward and checked accurately every day, because there were two people involved in the making of the card.

Q. When you say there were two people involved, to whom do you refer?

A. Mr. Bob Hughes would write the daily part and I would carry forward the accumulation, based on Mr. Hughes' figures.

Q. Mr. Hughes was another employee?

A. Yes.

Q. Was that weekly accumulation you referred to on Saturday night contained on the same card on which Saturday's business, as distinguished from the other days' business, was contained?

A. Yes, it was. That card showed the five days' accumulation plus that day's business individually.

Q. In that connection, did those cards and the accumulated totals carry all of the bets received, the total of the bets received?

A. Yes sir. [31]

Q. And did it include all of the pay-outs by way of expenses? A. Yes, sir.

Q. Did you also in that connection and on those cards keep a record of the bank, that is, the amount

(Testimony of Julius Krakauer.)

of money kept on hand with which to meet current expenses?

A. Yes, sir, that is known as the "nut."

Q. That was known as the nut?

A. This is vernacular.

Q. I understand, but in that connection was a record kept of monies advanced to the bank or nut, as you refer to it, or withdrawn from day to day?

A. Each day the nut was kept at \$300. If the nut had suffered a loss, Mr. Wild was called upon to bring it up.

Q. He would bring it up sufficiently to make the difference?

A. He would bring it up to the established or required amount and was given a credit for any advances he made and debited for any withdrawals.

Q. In other words, as I understand you, at the end of the day, if the establishment had paid out more than was taken in, so [32] that the bank or nut had been impaired, and there was less than a balance of \$300, you would make up the difference before you started the next day's business, is that correct?

A. Yes.

Q. And if he had made a profit over and above the day's expenditures he would withdraw the amount over and above that at which the business started.

A. He would do that daily.

Q. He would do that daily?

A. Yes, he would do that daily.

Q. Over that period of time, in addition to the money that he may have paid in to keep the bank

(Testimony of Julius Krakauer.)

in its \$300 daily condition, or profits which he may have withdrawn, did he withdraw any regular amounts daily or weekly?

A. Yes, salary, sir.

Q. Is that what it was termed, "salary"?

A. Well, sir, we all received a salary and he regarded himself as an employee, and rightfully so, I believe, and he received a salary.

Q. It was his business, was it not?

A. Pardon me, sir?

Q. It was his business, was it not?

A. Yes.

Q. How much did he withdraw as salary?

A. \$10 in addition to the regular bonus which was paid to all [33] of us when the profits were in excess of a certain amount.

Q. \$10 a day? A. Yes, sir, \$10.

Q. Was that kept as a part of the record?

A. Yes.

Q. As well as the profits which he withdrew from the business?

A. Yes, his weekly salary was accumulated on this card the same as the others. However, that was separate from the rest of the employees' salaries, which were kept as a total, except his which was kept separate.

Q. And in connection with this bonus of \$10 a day drawn as salary, was that withdrawn prior to figuring the profit or loss of the day?

A. Yes, sir. All expenses for that day were included.

(Testimony of Julius Krakauer.)

Q. Then that included the \$10 a day salary?

A. Yes, sir, that included the \$10 a day salary and all salaries of employees and bonuses and Fixed overhead.

Q. After that was done, then the bank was examined to see if there was more or less of a balance than \$300? A. Yes.

Q. And if there was less than \$300, he paid into the bank sufficient to bring it up, and if there was more than \$300 in the bank, he withdrew the extra over and above that amount? A. Yes.

Q. Was that reflected in the cards? [34]

A. Yes.

Q. Mr. Krakauer, could you say whether or not you acknowledge any other records, whether daily or weekly or otherwise, in connection with the receipts and disbursements of the business during the period in question other than the cards to which you refer? A. Not to my knowledge.

Q. All right.

A. No, it may have been, but not to my knowledge.

Mr. Belli: I ask that go out.

The Court: Yes, the answer may go out.

Mr. Campbell: Q. Well, do you know whether any other record was kept? Answer Yes or No.

A. No.

Q. So far as you know, the cards to which you refer were the only records kept? A. Yes.

Q. That was the part of your employment, to keep those records? A. Yes, sir.

(Testimony of Julius Krakauer.)

Q. And you kept those records daily?

A. Yes, sir.

Q. To the best of your knowledge, did those records correctly reflect the receipts and disbursements of the business which you have described?

A. Yes, sir. [35]

Q. I am going to show you a group of cards, some 52, I believe, and ask you if you recognize them.

The Court: Counsel, have you seen the cards?

Mr. Belli: I don't believe I have.

Mr. Campbell: Either you or your representatives have.

The Court: We will take a short recess, ladies and gentlemen of the jury. During this period, counsel may examine these exhibits.

Again, I admonish you, ladies and gentlemen, not to discuss this case among yourselves, nor suffer any person to converse with you on any subject of the trial; and you are not to form or express an opinion thereon until the case is submitted to you.

(Recess.) [36]

The Court: You may proceed, counsel.

Mr. Campbell: Mr. Krakauer, just before the recess, I showed you a group comprising, I believe, some 52 cards.

A. Yes, sir.

Q. And I asked you if you recognized those cards.

A. I do.

Q. Will you state what they are?

A. They are—I suppose they are all here, just the way—they are the records, part of which I made, and the others were made by Mr. Bob

(Testimony of Julius Krakauer.)

Hughes, according to the writing I see here. They are the record cards which were referred to in the previous testimony.

Q. Are those the cards with reference to the business for the year 1941?

A. Let me see the dates here, and maybe I will answer that question. Yes, sir.

Q. And these are the same cards that you testified concerning keeping there during the course of the business? A. Yes, sir.

Mr. Campbell: This group will be offered as Government's exhibit next in order.

The Court: This may be received and marked.

Mr. Belli: For the record on that, so that I will not, your Honor, disturb the order of the Government's case, there are a number of cards there, and there are a number of entries [37] on them. Now by my not objecting, I don't want to be bound, or have my client bound by every entry on here. At the same time, I don't want to be so meticulous that I would suggest that every pencil mark be gone over here.

Mr. Campbell: Well, every objection will be reserved.

Mr. Belli: Yes, that is what I want to do.

The Court: Very well, that may be the understanding. You may reserve your objections.

Mr. Belli: Subject to the cards being subject to cross-examination.

Mr. Campbell: That is, not as to the cards gen-

(Testimony of Julius Krakauer.)

erally, but as to any particular item which you may want to object to?

Mr. Belli: Yes, they were kept in the ordinary course of business, and with that understanding, they may be marked.

The Court: Government's exhibit in evidence, No. 7.

(The cards referred to above were then received in evidence and marked U. S. Exhibit 7.)

Mr. Campbell: Q. I show you a second group of cards, approximately 52 more or less, and ask you if you recognize those cards. (Showing.)

A. Yes. Just a moment and I will give a little gander here. Yes, sir, they are similar to the ones you just handed me a minute ago.

Q. They were kept by you under the same circumstances as the previous set? [38]

A. Yes, sir, they seem to cover the year 1942.

Q. The year 1942? A. Yes, sir.

Q. They were kept by you in the course business there? A. Yes, sir.

Mr. Campbell: This group will be offered as Government's exhibit next in order, subject to Mr. Belli's previously stated reservation, if the court pleases.

The Court: So ordered.

The Clerk: Government's exhibit No. 8 in evidence.

(The cards referred to above were then received in evidence and marked U. S. Exhibit 8.)

Mr. Campbell: I show you a third group of

(Testimony of Julius Krakauer.)

cards, and ask you if you recognize these, sir.
(Showing.)

A. They are similar, of similar tenor, as the ones that you have previously shown me and they are for the year 1943, and they must go to September, because that is the end of that period.

Q. Well, you will examine them and see to what date those particular cards go?

A. They went to 9/25/43, which is when I left the employ of Mr. Wild. That is what I wanted to say. I wanted to make sure these were in, because I was not there beyond that date in '43.

Q. You were not there as an employe? [39]

A. Not after that date.

Q. And these cards run up until September 25, 1943?

A. Yes, sir.

Q. Were they kept by you in the regular course of business?

A. Yes.

Mr. Campbell: These will be subject as Government's exhibit next in order, subject to the reservation expressed by Mr. Belli.

The Court: So ordered.

The Clerk: Government's Exhibit Number 9 in evidence.

(Cards referred to above were then received and marked U. S. Exhibit 9.)

Mr. Campbell: Q. Now, Mr. Krakauer, I am going to show you, referring to Government's exhibit 7—and ask that you examine these cards again; there are no cards for the period of April and May, 1941. Will you examine the cards and

(Testimony of Julius Krakauer.)

ascertain if that is correct? (Handing cards.)

A. They don't appear to be here.

Q. Do you recall whether or not the business was operating or whether it was closed during that period?

A. Well, it was probably closed for the usual reason—being the heat being on, because these two cards, which were just kept from day to day for such bets as *we* were brought in by friends and others of the establishment and I see that covers that period right here. I just kept that from day to day. [40]

Q. Was it your best recollection that business was not open generally to the public during April and May of 1941?

A. This apparently must have been one of those periods, sir, judged from the information that those cards reveal.

Q. Some business was accepted during that period, however?

A. Yes, sir.

Q. All right. Now I am going to call your attention specifically, Mr. Krakauer, to the first card appearing in this group, referring to Government's Exhibit 7, and which you have identified as the cards referring to 1941, this card being marked with a red numeral 1, and a date 1-4, and I call your attention to the blank where appears "January 4, '40." And now you have identified those as referring to '41. Can you explain the fact that the year appears as 1940.

A. Well, I divided, for the purposes of con-

(Testimony of Julius Krakauer.)

venience, something that has been generally adopted by much of the business world, into weeks of the year, no matter how they came out. And apparently in making this first card, I did something that we all do when the New Year comes—I put '40 down instead of '41.

Q. Does it relate then, to the first week of '41?

A. Yes, it must of necessity; that is just one of those lapses that we all indulge in when the year changes, for a day or two. [41]

Mr. Campbell: If the Court please, at this time I wish to have marked for identification for use of the convenience of the jury in following the next testimony as to these entries, photostatic copies of the cards which are held in the hand of this witness.

The Court: So ordered.

Mr. Campbell: There are some twelve photostatic copies.

The Clerk: Any particular order in which you want those—7A, 7B, C—do you want them marked individually?

Mr. Campbell: May these be given one number for identification?

The Court: So ordered.

The Clerk: Government's Exhibit 10 for identification.

(Photostatic copies of cards referred to above were then marked Government's Exhibit No. 10 for identification.)

Mr. Campbell: With the Court's permission, I

(Testimony of Julius Krakauer.)

would like to pass these to the jury during this interrogation.

The Court: Very well.

(Government's Exhibit No. 10 for identification was thereupon handed to the jury.)

Mr. Belli: These are photostats of the exhibits that are in evidence, are they?

Mr. Campbell: Yes, that's correct; for the first card appearing in Government's Exhibit 7.

The Clerk: Exhibit No. 7. [42]

Mr. Belli: These here, what is this?

The Clerk: That is No. 7.

Mr. Campbell: Q. Mr. Krakauer, I call your attention to what appears to be the face of this card in the upper left-hand corner of which appears the figure 1. A. Yes, sir.

Q. To what does that refer?

A. First week of that year.

Q. And the numerals 1/4?

A. That is the final day.

Q. That would be the Saturday that this card represents? A. Yes, sir.

Q. This would be one of the accumulated Saturday cards, is that correct? A. Yes, sir.

Q. Now, the first item appearing on the face of this card appears to be "T" with a credit of \$3,372. Will you state what that represents?

A. That is the take for the day, the amount of the bets made by the customers.

Q. In other words, that is the amount of money that was received in this establishment on that day?

(Testimony of Julius Krakauer.)

A. Yes, sir.

Q. Is that correct, sir? A. Yes, sir. [43]

Q. And does that refer only to the day, Saturday? A. That is only the day Saturday.

Q. That is to say, the fourth day of January, 1941? A. Yes.

Q. The next item appears to be "P", "O" with a debit item of \$2,963.85. Will you state what that refers to?

A. That is the pay-out to the customers, the winning bets.

Q. The next item is "A", \$316.65, debits. What is that? A. That is expense.

Q. The next item is "OS", \$48.50, debits. Will you explain that item?

A. That is overage or short.

Q. In other words, when you counted up the cash at the end of the day, you might have more cash than you previously accounted for or less than you should have, is that correct?

A. That's correct, sir.

Q. And the debit item of \$48.50 would have indicated what?

A. Would have indicated a very bad shortage for that day; it didn't occur very often, but apparently it did on that day.

Q. A shortage of \$48.50? A. Yes, sir.

Q. All right. Then you have a total debit of \$3,329 and credits of \$3,372? A. Yes, sir.

Q. One of which you have subtracted from the

(Testimony of Julius Krakauer.)

other. And you [44] have the figures "TOT Gain Day, \$43." What does that represent?

A. That is gain for the day. Might I say that, you say that I did. I did not make those figures, understand.

Q. Whose figures are those that you refer to?

A. Those are Mr. Bob Hughes' figures.

Q. And did those refer to all of those figures that I have read to you at this time?

A. Yes, sir.

Q. Now, what is the next notation there?

A. Well, at the end of the day we had \$219.20, and we started with \$201.20, and incidentally, those are my figures, which shows a gain of \$18 for the day, purely a very simple matter of starting with so much money, ending with so much money, and that determines your gain or loss.

Q. All right. The next item is \$120. What is that?

A. Well, that is \$120, that is the accumulation from the previous period.

Q. Of profit? A. Yes, sir.

Q. For that first week? A. Yes, sir.

Q. Then at the bottom you have certain figures; by whom are they written?

A. They are written by myself, sir. [45]

Q. That is below the double line?

A. Yes, below the double line.

Q. There appears first "T \$8,554, plus \$3,372—\$11,926." What does that represent?

A. Well, the figure of \$8,554 was the accumu-

(Testimony of Julius Krakauer.)

lated take from the Monday to Friday. The close of business Friday. And if you will look above, you will see that I bring down the figure written by Mr. Hughes, of \$3,372, which makes \$11,826 as the accumulated take for the week. The accumulated take.

Q. Yes. In other words, that is the total amount of money bet by customers in the establishment during the six day period referred to here, is that correct? A. That's correct, sir.

Q. And you have the amount followed by \$306 plus three one six six five, and then six-twenty-three dollars, fifteen. What does that represent?

A. That is expense, and I figured \$306.50 is the accumulated expense from Monday to Friday at the close of business Friday, plus the \$316.65 expense for Saturday, which Mr. Hughes' figure above seems to indicate is correct, that makes a total expense for the week of \$623.15, sir.

Q. Then you have a letter "B" \$145, plus \$43.

A. That letter "B" indicates the book. In other words, that is what the book made or lost. That is purely "B".

Q. And then you have "G" \$158. [46]

A. Well, that is the gain for the week.

Q. Is that 158 or 188?

A. That is 188, sir.

Q. And that is the net profit as shown by these figures for the week? A. Yes.

Q. Then you have "RCR..."

A. Debits. That is "DR" and "CR". I don't

(Testimony of Julius Krakauer.)

write very well. That is "debit" and "credit". That is Mr. Wild's withdrawals or accretions, or what he paid in, your understand, when the book ran short.

Q. What he paid in or took out, is that right?

A. What he paid in, yes, sir.

Q. That is a debit, and what he took out is a credit, is that right? A. Yes, sir.

Q. And you have a figure \$170—

A. No, repeat that question, sir.

Q. I reversed it myself. What he took in is a debit and what he took out is a credit, is that right? A. That's right.

Q. And you end up with the figure of \$170; what does that figure represent?

A. That is what he withdrew during the week.

Q. Does any of that represent salary or is the salary included [47] in the expenses which you have identified, of \$623.15?

A. They are included in that, but I kept it separate for his information. That is the salary he drew up to Saturday night, \$55, and up to Friday night, I should say.

Q. Well, that is the next item here, is it not?

A. Yes, sir.

Q. I am referring to the item, a credit of \$170 which you said you drew. A. Yes, sir.

Q. Now, that does not include the salary?

A. No, sir, the salary is included in the expenses, but in this particular case I separated it.

(Testimony of Julius Krakauer.)

Q. Now, the next item is "SAL, \$55, plus \$30.85." Is that a salary item?

A. That is the salary item for the week, \$55 being to Friday, and \$30 on Saturday, which you will find indicated on the front of the card.

Q. Now, what are those last figures which appear there?

A. Those are the over and short that I kept from day to day, deductions for overages, charges for shorts.

Q. You were short, you say, on this day, \$48.50; is that the first figure?

A. Yes, that, as I said, was unusual—something must have happened. Previously we were over \$3.20, so the next shortage for the week was \$45.30.

Q. That is the figure that is set out here?

A. Yes, sir.

Q. Now, turning to the reverse side, which is headed "January 4," what—first, whose figures are those appearing on that?

A. Well, they are partially mine and partially Mr. Hughes'.

Q. And whose writing is that?

A. The writing in ink, well, the January 4, '40" is mine, the \$226.20 is mine. That is, the cash on hand.

Q. No, I am referring now to the words that appear here.

A. "PAP" and so on down?

Q. Yes.

A. That is my writing, sir.

Q. To what point?

A. To the word "Janitor."

(Testimony of Julius Krakauer.)

Q. In other words, the first four items are in your writing, is that correct? A. Yes, sir.

Q. And whose writings are those?

A. They are my figures.

Q. And that column. All right.

A. Down to that point.

Q. Now, what does the back of this card purport to represent? A. This side of the card?

Q. Yes.

A. That is the first four items of the fixed charges, that [49] I know are going to come up for that day, and I put them—I made the card up the night before and had it ready for the next day.

Q. And they were in fact paid out that day?

A. What is that?

Q. They were paid out on that day?

A. Yes, sir, they were.

Q. Will you relate what those were?

A. Well, the "PAP" refers to the papers for the day, three copies of papers, five cents apiece, which was split up and put on the bulletin board; salaries for \$52, including all the salary; the forms were \$2, which were bought every day at the corner.

Q. And "FRM" refers to racing forms?

A. Yes, sir, they were bought at the corner cigar store.

Q. What is that next item?

A. "Janitor" \$5.

Q. That was a daily amount you paid the janitor?

(Testimony of Julius Krakauer.)

A. Yes, sir, at that time; and later on, why, we had one, a man come in, paid him by the week, you will find.

Q. What is that next item, "EXT \$30"?

A. That is Mr. Hughes. I don't know. I wouldn't—

Q. Do you know of your own knowledge what that is?

A. I wouldn't care to answer that, because I am not sure of it. [50]

Mr. Belli: Is that "EXT" or "EMT"?

The Witness: "EXT." That is the way I read it.

Q. The next item is what?

A. Is the rent for the room, \$117.50.

Q. Now, was that a daily, weekly or monthly rental?

A. That was monthly. We paid that, usually Mr. Wild paid it himself, because of his very close relation to Mr. Harper, the manager of the building.

Q. Yes.

A. And then he would draw it out as the business could afford it, maybe the same day or the next day, or whatever, when the opportunity presented itself.

Q. This was a monthly charge, is that correct, then?

A. Yes, that was, sir.

Q. And it so happened that on that occasion it was paid on the day of this card, January 4?

A. Yes, sir.

Q. If it had been paid on an earlier date, it

(Testimony of Julius Krakauer.)

would have been accumulated in the total expenses?

A. It would have been accumulated in the expenses. It just happened to go on that day.

Q. What is the next item, "NUT, \$105"?

A. "NUT, \$105." That is in Mr. Hughes' writing, but he has made an error in describing it because—

Q. Do you know what that \$105 was? [51]

A. Frankly, sir, it is a payoff.

Q. To whom? A. I don't know.

Q. Was that an item which you paid each month? A. Yes, sir.

Q. And in that same amount?

A. Yes, sir.

Q. And in keeping the books, did you keep a monthly record of the payment of that amount, \$105?

A. It was included—if it was paid in any other day, but this, it would have been included in the expenses, that is all—go right into the expenses. It just happened to fall on this day, that is all.

Q. You did, once a month, on some date; would this amount of \$105 expense for that purpose be shown? A. Yes, sir, once a month.

Q. And it so happened that in this particular month it fell on this date, is that correct?

A. Or it may have been that Mr. Wild paid it out previously, as he did the rent, then called on the book for it, when the book could afford it, or it happened to occur to him, but it was paid every

(Testimony of Julius Krakauer.)

month, either charged on the date or if Mr. Wild paid it, whenever he picked it up later on.

Q. Yes. But on this occasion, either it was paid on this day or picked up by Mr. Wild on that day, is that correct? [52] A. That's correct, sir.

Q. And was that payment made monthly during the whole period of time you were there—that is—Strike that. Was that made during the period here in question, 1941, '42 and up until September of '43 when you left the employment of Mr. Wild?

A. I am very, quite sure in saying it was paid every month. Of course—

Q. Did you yourself ever hand that amount to anyone?

A. Only on one occasion when Mr. Wild and Mr. Hughes were absent for some reason, personal or otherwise, and I was given an envelope—

Mr. Belli: Let me interrupt here, your Honor. I know nothing of this part, and if there is anything with reference to any "pay-off" or gambling or anything like that, I am sure that the proper authorities would be qualified to handle that. I don't think that names should be mentioned here unless your Honor feels that it is important. I know nothing about it, I tell you that sincerely and frankly, but as far as this goes, I understand that this is an income tax case. The source of the business, it is true, is from gambling. Now here we have an item, and apparently if Uncle Sam is entering a partnership here with Mr. Wild, this is an item that is deductible expense. I think that is far

(Testimony of Julius Krakauer.)

enough to go on it. There may be innocent people involved here or if not innocent, let them be dealt with properly by the proper authorities. [53]

Mr. Campbell: May I state, your Honor, that under the law such an expense is not deductible for income tax purposes. It is necessary that we establish the nature of these in determining what allowable expenses there are in connection with this business, to ascertain the true income of the business. If these payments were made, as your Honor, I know, is familiar with the law, they are not for reasons of public policy, allowable. We are not attempting to try here, of course, any matter which should or could be tried by the local authorities; and it is not our purpose in introducing this evidence to in any way usurp or stab into the authority of those agencies which are intrusted by law for that purpose, but we think we are entitled and should show this in arriving at the actual net income of this defendant, these not being allowable, but through the testimony having been accumulated as an expense of business.

The Court: You now refer to the item of \$105?

Mr. Campbell: The item of \$105, yes, sir.

The Court: That was the item referred to as paid monthly by Mr. Wild?

The Witness: Yes, sir.

The Court: What was the last question?

Mr. Belli: That is the question, your Honor, that is objected to; unless your Honor feels we should go into that, I think the character of the

(Testimony of Julius Krakauer.)

fund which has been characterized [55] here as “pay off” should be a legal matter from there on in, as to whether that is an allowable deduction.

The Court: Counsel, let us understand this phase of the case. With respect to this item of \$105 referred to by the witness as a so-called “pay-off” colloquially, do you contend, counsel for the defendant, that those items or the accumulation thereof are deductible, or otherwise?

Mr. Belli: I would think that would be deductible. It is a rather strange case. The only way that he could run this business and make his income was by—

The Court: Well, your position having been taken on that, that it is deductible, the Government claims it is not deductible. Since you have adopted that position, all the surrounding facts and circumstances considered, it is clearly admissible in order to establish the character of the fund. The objection is overruled. You may answer the question.

Mr. Campbell: Will you read the question, Mr. Reporter?

(Previous question read.)

A. On a certain occasion, the date of which I couldn't, naturally at this late date, name, Mr. Wild and Mr. Hughes, either one of whom paid—or at least I was told they paid it—I was handed an envelope to give to a person whom the elevator boy would tell me would call for it.

Q. Did you know the person?

A. I did not, sir. I handed him the envelope.

(Testimony of Julius Krakauer.)

I don't even [55] know what was in it, sir. I especially declined to have anything to do with that phase of the business.

Q. Well, you were informed of the nature of this \$105 monthly payment?

A. Yes, sir, I knew, I knew. I well knew what it was for. I wouldn't be telling the truth if I didn't say that.

Q. And did he inform you as to the nature of the payment?

A. Well, whether he directly informed me or not, I wouldn't want to say. But I well knew the nature of this \$105 item, sure. I think—I want to be honest, I don't want to pin myself down that he came to me and said, "This is what it is."

Q. Now, what is the next item that appears there?

A. "Elevator." We gave the elevator boy an allowance of \$5 a month for such services as he rendered the establishment—well, in the matter I just spoke of, bringing this man downstairs and also other services of like character.

Q. Now, I am going to refer you back to the entire group of cards, Government's Exhibit 7. of which the card you have just described was a part. Now, are the entries on the remaining cards in that group similar to the ones which you have described in particular?

A. Well, without going—I will go through them all if you desire me to, sir, but I believe you will find that the entries are about the same, because I

(Testimony of Julius Krakauer.)

made up this card after sort of a trial and error period, and got it down to as few items as I [56] could, which would properly reflect the business and truthfully so; and I don't think there is any change in them.

Q. Now, as far as you know, those cards contained a record of the receipts of the business and of all expenses in connection with that business, is that correct?

A. Yes, sir. I should like to say also, Mr. Campbell, that every now and then one of the top portions of these cards bears my handwriting. Very few, however; just why that is true, maybe Mr. Hughes wasn't there for some reason or other when the business was closed for the day, but they are only a few in number, probably two or three in this whole group. I just want to say that, because I said before that all of the top portions of the cards were in the handwriting of Mr. Hughes, whose records are used in bringing down for the accumulated weekly information.

Q. Well, now, as I understand, either you or Mr. Hughes would write the daily information for all of the accumulated information at the bottom of the card, that was all accumulated by you?

A. Yes, sir.

Q. And that was a part of your employment?

A. Yes, sir.

Q. And now there is just one other thing with regard to that first card. On the reverse side appears some figures, \$226.20, a subtraction of \$50,

(Testimony of Julius Krakauer.)

\$176.20, \$43, and \$219.20. Will you [57] state what those figures represent?

A. Well, the \$50—

Q. What is the \$226.20?

A. The \$226 was what we started with.

Q. That is the amount of money on hand at the beginning of the day? A. Yes, sir.

Q. And what is the \$50?

A. The \$50 was, apparently Mr. Wild was in need of some immediate funds—

Q. Was that a withdrawal by him?

A. Yes, sir, that always appeared in that form.

Q. And that left \$176.20, is that right?

A. Yes, sir.

Q. Now, what is the \$43?

A. The \$43, he apparently added that.

Q. Well, is that the profit for the day as reflected from the front of the card?

A. No, sir.

Q. Is that the total gain for the day?

A. May I correct that answer, sir?

Q. Yes.

A. This isn't one of the cards that shows the situation that I just described. The \$50 was the \$50 paid to Mr. Wild for profits of that day, which left \$176.50. [58]

Q. And what is the \$43?

A. Mr. Wild probably handed that back, you understand, just in order to bring the nut up to approximately \$219.20, approximating what it started with.

(Testimony of Julius Krakauer.)

Q. That would be the amount you would have to start with on the following Monday, isn't that correct, sir?

A. Yes, sir, that would; that gain for the day was readded by him.

Q. Now, if I may take these, please. I am going to show you Government's Exhibits 8 and 9 and ask you if your description of the entries here on these cards would be the same as you have given with reference to Government's Exhibit 7, the cards for the year 1941.

A. Well, without going all through them, sir, there was no change in the form which I used, the symbols used, the manner of accumulating them, and from where I drew my figures for daily accumulation and at the end of the week. During the entire period which is covered by this case, as I understand it, that is the case. As I say, I could look through them all, but I am quite sure there is no change, sir. There might be a few cards, the upper portion of which I wrote, as I told you a moment ago, but they are very few in number.

Q. Now, all of those cards, together with the cards in Government's Exhibit 7—that is, those relating to 1941—do they all accurately and truthfully, to the best of the information [59] which you had at the time the entries were made, represent the business that was done there at 1182 Market Street?

A. Yes, sir, especially because—

Mr. Belli: Well, just a moment. That would be a conclusion of this witness, a conclusion over

(Testimony of Julius Krakauer.)

all of his testimony. The facts speak for themselves—or the lack of facts speak for themselves, your Honor. I think he is testifying.

The Court: Objection is overruled.

Mr. Campbell: Q. What is your answer?

A. They do, with the qualification, however, that I drew my daily information for accumulation from the figures made up by Mr. Hughes.

Q. Yes.

A. But I satisfied myself each day that the amount of cash was there that these figures showed, because I was responsible for that cash and in fact being responsible for that cash, was why I insisted that some sort of a record be kept, because I have handled a lot of cash in my life and have since I was employed by Mr. Wild, and I always insist that I be protected to that extent, which was the reason for my making up this character of record.

Q. I am going to call your attention to another card in Government's Exhibit 7, the card with reference to the year 1941, and call your attention to the back of this card, where appears a letter "X"—105, which was the type of entry which we [60] did not see on the card you were originally shown. Do you know what that is?

A. Well, that is the same character of item that I spoke of, pay-off, you understand.

Q. That was for protection?

A. Yes, sir; in other words, we made the "X" because we didn't, of course, naturally, wouldn't

(Testimony of Julius Krakauer.)

want to put "Pay-off" or anything of that kind down.

Q. But that is what the "X" represents when it appears?

A. Whenever it happens to appear on the daily expense for Saturday, you will find it in that form, sir; that is the reason I answered a while ago that Mr. Hughes had made an error when he put down the word "nut"—that was just merely a lapse.

Q. "X" was the usual code used?

A. Yes, sir.

Q. And where the pay-off was on a Saturday, as I understand you, it was accumulated in the total which is accumulated in those cards as expense?

A. Yes, sir.

Q. Now, I notice in examining these cards that occasionally two "X's" appear with reference to expenses. Can you state what that consisted of?

A. That could be one of several things, but I believe I am safe in saying that in the majority of those cases that [61] double "X" was used for something that we didn't want to write out, or spell out, as the saying goes. But they would usually refer to expenses in connection with the bonds and attorneys' charges after we were picked up, or raided.

Q. How often did that occur?

A. Of course, to be absolutely definite, after all these years, that is something I wouldn't undertake.

(Testimony of Julius Krakauer.)

Q. But that was a symbol used for that purpose?

A. Or some symbol of like character, that we didn't want to spell out, as I said a moment ago.

Q. How often did that occur, to the best of your recollection, in the period here in question, 1941, '42 and '43?

A. Well, there were two forms of raids.

Q. Well, first how much, or, rather how often were you raided? A. I wouldn't want to say.

Q. What is your best recollection, Mr. Krakauer?

A. Oh, probably during that period that is covered there, maybe eight or ten times. That is a guess.

Q. You say there were two kinds of raids. To what did you refer?

A. Well, there was the kind that we knew about in advance. That was for the purpose of putting the particular establishment on the blotter, for such inspection as might be necessary, or periodically made.

Q. Now, was that in connection with the \$105 you said you paid [62] monthly?

A. I don't know, sir.

Q. I see, very well.

A. The same way, I will tell you, I know nothing about that.

Q. How often did those occur, that you knew about in advance?

A. Eight or ten times in that period, but there

(Testimony of Julius Krakauer.)

were some of those eight or ten times in that period that were what we call "beef" raids, where somebody complained about, oh, not having been paid off as they should have been, having been dishonestly treated or cheated, or something like that. And, of course, then it became a headquarters raid, and there wasn't any question about it then.

Q. You had received no warning in those cases?

A. No, sir.

Q. All right. Now, with reference to these cards—strike that. With reference to the operation of the business there, was there conducted what is sometimes known as "laying off" bets? Just answer that "Yes" or "No," if you will.

A. No.

Mr. Belli: "Laying off" of what?

Mr. Campbell: Laying off bets.

Mr. Campbell: Q. Will you explain what is meant by "laying off bets" in the business of horse betting?

A. Well, when a bookie finds himself overloaded on a certain horse, or his position is bad as compared with the bets on [63] other horses numbered in that race, he lays off a portion to protect himself, and when I said "No" a while ago, that is not a hundred percent correct, but the "lay-off" was very, very limited.

Q. Well, now, when they what you call "lay off" to protect themselves, what he does, is it not, is place covering bets with other bookmakers—is that correct? A. Yes, sir.

(Testimony of Julius Krakauer.)

Q. And that is usually accomplished in either one of two ways, is it not, by having some person, some other bookmaker, knowingly accept the risk on the bet, or else by having runners make bets in someone else's establishment? Is that true?

A. That is true; it is done both ways.

Q. And was it done both ways in this establishment?

A. Yes, sir; some bookies do it largely, some do it limitedly.

Q. Now, may I ask you this, were the amounts involved in any lay-offs that were used in this establishment reflected in the bets you have reported on your weekly cards and the pay-offs to the customers also reflected there?

A. Yes, sir, whenever a bet was sent out as a lay-off by a runner, usually across the street, somewhere—there was a bookie on each street—why, it was noted, it became a part of the day's business.

Q. And it is reflected on the cards you have here? A. Yes, sir. [64]

Q. So that any profits or losses by reason of that are reflected in your totals on these cards, is that correct?

A. I think that is the situation.

Q. Now, something was said earlier concerning the subject of "sleepers." Will you state what a sleeper bet is?

A. Well, a sleeper is a bet that there is nothing dishonest about, irrespective of what anybody tells you.

(Testimony of Julius Krakauer.)

Q. No, don't characterize it, just what is it?

A. It is a bet that nobody calls for—when it is laid aside in the evening, after the day's business, and the bettor doesn't call for it, either the next day or ever.

Q. Can you state why that occurs—or let's put it this way: It is a fact, is it not, that sometimes a bettor intends to bet on a particular horse and gives the wrong number to the ticket taker, is that correct?

A. That's correct, sir.

Q. And while that horse comes in, he doesn't know he has bet on the winner, isn't that correct?

A. Yes, sir, so he has not been in any way misused.

Q. Yes. Well, now, during the period here in question, 1941, 1942, and 1943, did there monthly occur sleepers—that is to say, money uncalled for by bettors?

A. Yes, there were.

Q. And what was done, what was the practice in this particular establishment with regard to that money? How long would [65] it be held, and then what disposition would be made of it?

A. Oh, a limited time, and then turned over to Mr. Wild.

Q. How long would it be held on the average?

A. A couple of weeks, perhaps. I did have a little record of that at one time, but I don't remember it now.

Q. You don't have that record now?

A. No, sir.

Q. Now, can you state the highest amount of

(Testimony of Julius Krakauer.)

sleepers which you now recall which were turned over to Mr. Wild at a particular month?

A. Oh, it would run as high as 300, which I think was tops.

Q. And what was the least it ever ran that you recall?

A. Oh, maybe \$50, \$60, something like that.

Q. Can you state what the average was over the period of time, to the best of your recollection?

A. It is pretty hard without that record, but I would say \$125, \$150. That might not be correct, though.

Q. That would be your best estimate?

A. Yes.

Q. Would that be per month?

A. Yes, sir.

Q. Now, was any of that money which was received by way of sleepers reflected in these cards, Government's Exhibits 7, 8, and 9?

A. It couldn't have been, because they were taken out as pay-outs [66] at night, so they were reflected in the pay-outs. It couldn't have been.

Q. I see. Well, any money that Mr. Wild received by way of these sleepers which were not called for is not accounted for as a profit of the establishment as set forth in these cards which you have identified here, is that right, sir?

A. That's correct.

Q. Now, you stated, I believe, that you left Mr. Wild's employment sometime in September?

A. Yes, sir.

(Testimony of Julius Krakauer.)

Q. 1943? A. That's correct.

Q. I believe you testified in answer to a previous question—

A. It was a Saturday night, and according to those cards, it must have been the 25th. I haven't a calendar here, so of course I can't certify to that.

Q. Was that your best recollection after examining these cards, that it would be Saturday night, the 25th of September, which is represented by the last card here, is that correct?

A. Yes, sir, I think a calendar would probably show that to be correct.

Q. Now, from then through the balance of the year, you were no longer in Mr. Wild's employ?

A. No, sir. [67]

Q. Were you in his place of business from time to time until about the end of the year?

A. No, sir, I never went back.

Q. You never went back? A. No sir.

Q. All right. Now, in connection with these cards and the keeping of these cards—strike that. At the time that you left Mr. Wild's employment, what, if anything, did you do with these cards?

A. Repeat that, please, sir?

Mr. Campbell: Would you please read the question to him, Mr. Reporter?

(The reporter read previous question.)

A. I kept them.

Q. You took them with you? A. Yes, sir.

(Testimony of Julius Krakauer.)

Q. Did you have a discussion with anyone there at the time that you took these cards?

A. I did, sir.

Q. With whom?

A. With Clarence Collard, who was appointed to—

Mr. Belli: Now, just a moment, anything that was said to anyone else is not binding upon Mr. Wild, himself.

Mr. Campbell: He hasn't started to relate a conversation yet. [68]

Q. With who? A. Clarence Collard.

Q. Who was Clarence Collard?

A. He was the cashier.

Q. Employed by Mr. Wild? A. Yes, sir.

Q. Was he related to Mr. Wild?

A. Not that I know of. I am quite sure not.

Q. I see. May I ask you if at that time you had any conversation relative to taking these cards?

A. I did, sir.

Q. All right. Now, during the period of time that you were employed there, did you have any discussions with Mr. Wild relative to the payment of income taxes to the United States? Now, answer that "Yes" or "No," if you will. A. Yes.

Q. And did you have such conversations on one or more than one occasion?

A. Several, perhaps three would cover it. It might have been an extra one beyond that.

Q. You, at this time, definitely recall three separate conversations? A. Yes, sir.

(Testimony of Julius Krakauer.)

Q. When was the first of such conversations, to the best of your recollection? [69]

A. Early in '43.

Q. Can you place the date more accurately than that, or is that your best recollection?

A. That is my best recollection. I don't want to place dates that I can't substantiate.

Q. I understand.

A. It was early in '43.

Q. Can you place it with relation to any other event?

A. I can, sir.

Q. And with relation to what event?

A. Early one morning of the day—

Q. No, just place the event, not what occurred.

A. What was that?

Q. I say, there was some event?

A. Yes, sir.

Q. What was the event?

A. Conversation I had with Mr. Hughes.

Q. Well, now, let's get to the conversation with Mr. Wild. Who was present when you had your conversation with Mr. Wild?

A. No one.

Q. Just Mr. Wild and yourself?

A. Except on another occasion, Mr. Bob Callahan was standing there; whether he heard that, what was said, I don't know. But that wasn't the first one. [70]

Q. No, I am getting to the first one now. We will come to the others later.

A. No one.

Q. And where was the conversation?

A. At my station, where I wrote tickets.

(Testimony of Julius Krakauer.)

Q. That is in the business establishment at 1182 Market Street? A. Yes, sir.

Q. What was said?

A. Am I permitted to tell you what led up to it?

Mr. Belli: Well, I will stipulate you may say anything you want.

Mr. Campbell: Q. All right, go ahead—counsel has agreed.

A. Early one morning before the establishment was open for business, that is, before the first races were, near post time, someone appeared in the establishment, and the first thing I knew—I didn't know the man—he was over talking to Mr. Hughes very earnestly near the radio. That is, we had a radio, a cabinet radio which had nothing to do with the loudspeaker we referred to previously. And after he left, Mr. Hughes came and told me that this man was from the Internal Revenue Office, and he was afraid the Jules, as we referred to him there, or "Pop," sometimes—

Mr. Belli: I am sorry, I didn't hear that. Would you read it, Mr. Reporter, where he dropped his voice? [71]

(The reporter read last part of previous answer.)

Mr. Campbell: Q. Proceed, Mr. Krakauer, and keep your voice up.

A. Yes, sir. . . . was in some trouble on his, as I recall it, '41 Return.

Q. Now, as a result of Mr. Hughes telling you that, did you then have a conversation with Mr. Wild?

(Testimony of Julius Krakauer.)

A. Yes; well, I told Mr. Hughes that I thought he would, and he said that he had been—

Q. Well, let's not go into the conversation.

A. All right.

Q. What you thought or Mr. Hughes thought. Let's go directly to the conversation.

A. All right, Mr. Wild came to me after he came in; he wasn't there when this conversation took place between these two men, and when he came in, evidently Mr. Hughes must have reported the situation to him, and he came over to me and inquired what I thought about it. And I told him that it would seem to me that he would have some explaining to do, and he got quite angry.

Q. Was that all that occurred at that time?

A. Yes, sir.

Mr. Campbell: Shall I go to the next conversation, your Honor?

The Court: I think perhaps we had better take a recess, if this is a proper time in your narrative statement. [72]

Mr. Campbell: Yes, sir.

The Court: Ladies and gentlemen of the jury, the same admonition to you. We will resume court at two o'clock this afternoon for further trial of this case, and I admonish you not to discuss the case with any person or not to form or express any opinion thereon until it is finally submitted to you.

Afternoon Session, Wednesday, August 11, 1948,
2:00 p.m.

The Court: The jurors are present now, gentlemen. That stipulation may be continued in effect and unless otherwise noted, so I will not have to repeat the stipulation.

Mr. Belli: So stipulated.

The Court: Mr. McMillan?

Mr. McMillan: Your Honor, just a little while ago I learned with very much regret that a gentleman very much beloved by all of us, Francis A. Garrecht, Senior United States Circuit Judge for the Ninth Circuit, passed away last night. I don't believe I ever knew a more kindly man than he. His life was expressive of graciousness, good will, and courtesy. He has been a firm friend of mine for a long while. I remember a short time ago he remarked to me that from experience, there is nothing more advantageous to a man than mildness and a forgiving disposition. That was one of his main ideals.

I know we will all miss him, and I move that when this court adjourns today, it do so out of respect to the memory of Francis A. Garrecht.

The Court: Thank you, Mr. McMillan.

Mr. Belli: May I likewise join in that motion?

The Court: You may, Mr. Belli.

I certainly could not add anything to your remarks, Mr. McMillan. I think that you have covered in a very brief few [74] words the character and outstanding virtues of a great jurist and an outstanding public servant.

I know that in my brief tenure of office, particularly I have been afforded a great inspiration in the conduct and deportment of Judge Francis Garrecht.

It is with great regret that we will adjourn this Court today out of respect to his memory.

You may proceed, counsel.

JULIUS KRAKAUER

recalled; previously sworn.

Direct Examination—(Resumed)

Mr. Campbell: Q. Mr. Krakauer. at the time of the recess you had related a conversation which you had had early in 1943 with Mr. Wild relative to the income taxes. You previously stated that you had had at least three conversations which you recalled. Have you stated now, all that you recall of the first conversation?

A. As I say, I told him that he would have, in my opinion, some explaining to do, and he became very angry.

Q. What did he say?

A. He said, well, I wouldn't know all about his business; and that ended the conversation as far as we were concerned.

Q. And when was the next conversation?

A. I should say maybe in two or three weeks. He came over to [75] my station and Mr. Callehan, who was over on the typewriter.

Q. This was at the business establishment?

(Testimony of Julius Krakauer.)

A. This was at the business establishment.

Q. Can you place this conversation with reference to the 1942 returns, as to the time when they should have been filed?

A. No, this was with reference to the 1941 returns.

Q. Yes, I know, but can you place the time with reference to March of 1943?

A. No, it was much before that—very much before that.

Q. Very much before that? A. Yes.

Q. But it was after the first of the year?

A. Yes, it was after the first of the year in 1943.

Q. Would you relate what was stated on that occasion?

A. Mr. Wild came to my station and said Mr. Callahan wanted some figures from me and would I please give them to him. I left my station and undoubtedly Mr. Collard took over for me, and I walked over with Mr. Callahan. Mr. Callahan was standing a little away from me and whether he heard what Mr. Wild said, I don't know.

Q. What did Mr. Wild say?

A. To give him the figures he desired.

Q. Who was Mr. Callahan?

A. As I understood it, he was the man who made the return in question about which our conversation took place before. [76] I never have received a return before.

(Testimony of Julius Krakauer.)

Q. You had nothing to do with the preparation of the **return**?

A. No, I don't even know where he made it.

Q. Did Mr. Wild tell you what figures to supply at that time?

A. No, just that Mr. Callahan wanted some figures and would I please give them to him, which I was willing at that time to do.

Q. When was the third conversation you had?

A. The third conversation was evidently as the result of the figures I gave Mr. Callahan.

Q. When was the conversation?

A. Maybe a month or two after the one I spoke of in which he requested—

Q. Who was present on that occasion?

A. No one except Mr. Callahan and Mr. Wild came in very much elated—he came in the regular entrance in the back or front of the room, whichever way you want to look at it.

Q. Would you relate the conversation?

A. He came by and sort of slapped me on the back and then he said, "I got that all settled." He said, "You see, I know how to settle things of that kind."

Q. Did he say what he was referring to?

A. Oh yes, he was referring to the matter of the 1941 return, about which there had been some question.

Q. You say you had been requested to prepare some figures and [77] give them to Mr. Callahan?

A. Yes, sir.

(Testimony of Julius Krakauer.)

Q. Did you prepare some figures for Mr. Callahan?

A. I didn't prepare them; I went over to where he was working and took twelve cards—at least they turned out to be twelve, but there may have been more in the pile that he had dictated and he gave me certain figures, I should put down on the 12 cards in my own handwriting.

Q. At the time you started, were those blank cards? A. Those were twelve blank cards.

Q. Mr. Callahan dictated what was to be placed on those 12 blank cards?

A. Yes, and the two figures were to represent, as I recall it, total take for every month, and expenses.

Q. Did you put down the figures which Mr. Callahan dictated?

A. I put down the figures which Mr. Callahan requested me to.

Q. Did those figures bear any relation or were they reflected in the cards that you identified?

A. Very decidedly not.

Mr. Belli: May we have the figures themselves?

The Court: What is the comparative analysis that is being made? There is a discordant note in my mind.

Mr. Campbell: The witness testified that he was instructed to furnish certain figures to Mr. Callahan, and I am simply getting a description of the figures. He has now stated that [78] Mr. Callahan dictated certain figures that he was to place on

(Testimony of Julius Krakauer.)

twelve cards. I asked that he remit whether those figures had any relation or were a reflection of the figures related on the Government Exhibits and which he has identified as the true records.

The Court: The objection is overruled.

Q. You have a recollection, though, do you?

A. I had a good recollection very much. I worked with figures all my life and I knew they were not correct.

Q. When the figures were presented by Mr. Callahan, you made a mental comparison, did you?

A. I didn't take the cards and compare them.

Q. Did you have a definite concept in your mind? A. Yes.

Q. How long could you retain that concept?

A. Pretty well for some time now. Having worked with figures all my life. Maybe not now, but I had a pretty good idea then of what the figures were from month to month.

The Court: You may examine the witness if you so desire, counsel, on this point.

Mr. Belli: I can either do that, or let it go until the end of the cross-examination.

The Court: I would not want a comparison made, counsel.

Mr. Campbell: I don't intend to make a comparison. This was a preliminary question leading to something else. [79]

The Court: All right, we will overrule the objection.

(Testimony of Julius Krakauer.)

Mr. Campbell: Q. You would say that they did not— A. Decidedly not.

Mr. Belli: May we have this subject to a motion described by the court.

The Court: Yes, the motion is deserved, and my ruling is deserved.

Mr. Belli: Thank you.

Mr. Campbell: Q. What were some of those twelve cards when you last saw them?

A. At Mr. Callahan's station while he worked on the typewriter, I went back to work.

Q. Have you ever seen them since that time?

A. No, I have not.

Q. Do you know where they are at this time?

A. I have no knowledge of that.

Q. You have no knowledge?

A. I have no knowledge, no.

Q. You say that subsequent to your making up of those cards Mr. Callahan and Mr. Wild came into the office and you stated that he was elated. Is that correct? A. Yes.

Q. What did Mr. Wild say to you on that occasion?

A. That he had the matter settled. Whether he stated that it was a tax matter, I wouldn't want to say. It is too long ago. [80] But the implication and impression naturally was—

Mr. Belli: I move that go out.

The Court: Whatever implications there may be is a matter for the court and the jury. Just state

(Testimony of Julius Krakauer.)

the facts as you recall them without any editorial comments.

Witness: All right, sir.

Mr. Campbell: Q. Did he say anything else on that occasion?

A. Nothing beyond what I stated in answer to your previous question that he knew how to fix up such matters, or words to that effect.

Q. And now, coming back again, Mr. Krakauer, to these three sets of cards, U. S. Exhibits 7, 8, and 9, which you have identified as the records kept for the years 1941, 1942, and 1943, as being the Saturday cards with the weekly accumulation, after these cards were made up—first, let me ask you this: Were these the only set of cards, or was there more than one set of cards made?

A. There was more than one set of the day to day cards made. But there was a duplicate of the Saturday or weekly statements made up at the request of Mr. Wild and I gave him one every week.

Q. That would be a duplicate of the cards here?

A. A duplicate of each of the weekly cards, yes.

Q. Does that include the entries for Saturday itself? [81]

A. The exact duplicate of that, yes.

Q. Is this the original card with the original entries? A. Yes, sir.

Q. So that it was a copy of this you say that was made up for Mr. Wild.

(Testimony of Julius Krakauer.)

A. It had to be, sir.

Q. Not what it had to be, what it was?

A. Yes.

Q. And you say that those were given to Mr. Wild weekly?

A. Yes, sir.

Q. Now, on or about the time you left Mr. Wild's employ, or at any time during your employment there, did you have any conversation with Mr. Wild relative to the disposition of these cards? Answer that yes or no if you will, please.

A. Yes.

Q. When was that?

A. That was after—quite a little while—and when I say “quite a little while”, I mean perhaps a month or more after the settlement that was mentioned in my reply to the question when he and Callahan came in together, he told me to destroy all the cards I had. I had some outside of these.

Q. When you say “outside of these”, to what are you referring?

A. In other words, they were referring to 1939, and 1940, and I destroyed them. [82]

Q. They were referring to 1939 and 1940?

A. Yes, sir.

Q. What did he tell you? What cards did he tell you to destroy?

A. He told me to destroy all the cards.

Q. But you retained these?

A. Yes, sir.

Q. As I understand your testimony, when you left the employment of Mr. Wild, you took these cards with you?

A. Yes, sir.

(Testimony of Julius Krakauer.)

Q. Did you have any conversation at the time you terminated your employment with Mr. Wild as to the termination of employment, and particularly with reference to these cards? Answer yes or no. A. Yes.

Q. Do you recall the date that that was with reference to the date that you left? You say that you left the 25th of September?

A. It was on the 25th of September.

Q. 1943? A. Yes.

Q. Who was present at that time?

A. Mr. Collard and an old friend of both Mr. Wild and myself, whose name I cannot at the moment recall, but I can identify him as a Spanish War Veteran from my home town in Texas who [83] had arthritis. Mr. Wild told Mr. Collard to check me out.

Q. Just state what was said at the time.

A. Mr. Wild told Collard to check me out and Collard remained there to do so. Wild went out of the door leading to the elevator.

Q. Now, we cannot have the conversation after Mr. Wild left. Is that all?

A. No, he came back, however.

Q. All right, after Mr. Wild came back, what was the conversation?

A. He said, "Remember, don't you endeavor to do me harm in this tax matter because you are into this as deep as I am."

Q. Was it as a result of that conversation that you retained these cards?

(Testimony of Julius Krakauer.)

A. And also the fact that I had regretted and did not know what my legal and criminal culpability was in giving those cards to Mr. Callahan, and I felt I was justified in retaining them to protect myself in case of necessity.

Q. When you say or refer to the cards which you gave to Mr. Callahan, you are referring to the cards which you previously had written up at his dictation?

A. I am not a tax expert or a lawyer.

Q. But when you say "twelve cards" you are referring to the twelve cards you gave to Mr. Callahan?

A. Yes, sir, I refer to the twelve cards that I gave to [84] Mr. Callahan.

Mr. Campbell: You may cross-examine.

Cross Examination

Mr. Belli: What did you call it around the booking establishment at that time—tocs?

A. Yes, sir.

Q. That was more or less a term of endearment or affection?

A. Yes, adopted, before I came there, apparently, Mr. Belli.

Q. You were held in esteem and quite a bit of affection over a period of years?

A. Yes, sufficiently, because I gave him a very important job when I was head of the War Community in El Paso, Texas.

Q. Where did you first know him?

(Testimony of Julius Krakauer.)

A. When I had a business acquaintance with him when he was in El Paso, Texas.

Q. How long ago would you say?

A. I can't guage it by my age—about 30 years.

Q. So there would be no question about his honesty, you would characterize him as honest in his dealings with the public and with everyone else as far as you know?

A. Exceptionally honorable.

Q. You add "honorable" to my description "honest".

A. There isn't much distinction there.

Q. By the way, on these sleepers, there are a couple of points [85] I want to correct you on. May I refresh your memory with reference to what they call sleepers. I think you said that there was nothing dishonest in the way they were handled, that people would not come in to pick up their bets they had won, and that money would then go to Julius? A. Yes.

Q. Don't you recall he divided that amongst the help there?

A. Mr. Belli, that was supposed to be the habit, but, except for handouts, now and then, it was not definitely divided fifty-fifty.

Mr. Campbell: Will you keep your hand down, Mr. Krakauer, please?

A. Thank you, Tom, I have a bad habit of that. I'm glad you called my attention to it.

Mr. Belli: Q. But there was some division of the sleepers?

(Testimony of Julius Krakauer.)

A. Besides the bonus on the profits, he would give a handout, but not on a fifty-fifty basis.

Q. Weren't you there on a lot of occasions when people would give a number, and say, 585, and the bet would be on 585, and they would come in and swear they had said 685, and that 685 had won the race, and Julius would not argue, but would pay?

A. Yes, he was very liberal that way, also, sir.

Q. As a matter of fact, didn't he have a rule that the customer [86] was right three times before he would forbid him from coming back and betting?

A. That's correct. In fact I might say that his reputation was very good in that respect.

Q. Julius was "in hock" quite a bit, to use the vernacular of the trade? Didn't he have to go down and pawn quite frequently?

Mr. Campbell: Just a minute, if he knows—

The Witness: I do know, sir.

Mr. Belli. Q. It was common knowledge, wasn't it?

A. Yes, it was common knowledge, because I to Maxferd's on two or three occasions. I might say, sir, I don't know whether it is something you don't want, but I did that—

Q. I will try and stop you if I don't want it. Well, in any event, if Julius had his ups and downs during the time you were there financially as reflected at least in the times that he went to Maxferd's to borrow? A. Yes.

(Testimony of Julius Krakauer.)

Q. Do you know how much he had to go and borrow there at different times?

Mr. Campbell: I object to the question in that form.

The Court: How much he had to borrow?

Mr. Campbell: It seems a fact not in evidence.

The Court: You might reframe the question.

Mr. Belli: Q. How much did he borrow then at different [87 times, do you know?

A. I picked up a ring one time for him. I think I took 2,000, but I don't want to be too certain about that because it was too long ago. I think it was \$2,000. It might have been \$1,500.

Q. As a matter of fact, if you will pardon me for going into this, he borrowed \$3,000 from you, Mr. Krakauer, on one occasion?

A. Well, Mr. Wild—let me see, before I went to work for him, he was indebted to me, and during the entire years I worked for him, I don't think there was one day hardly, except the seven months before I severed my relations with him, when I felt that our relations were deteriorating, that he did not owe me—sometimes on the scratch of the pen and sometimes in the open.

Q. Was he a pretty sloppy man about paying it back, or how?

A. Sometimes, if things were going well, he would pay me back and then borrow it right back and pay me back and so on and so forth.

Q. This was over a period of how many years?

A. During the entire time I was there except

(Testimony of Julius Krakauer.)

the seven months I speak of where I thought I'd better not let the situation continue because it might become unpleasant.

Q. At least, it covered the period of time in which the indictment covers? [88]

A. Yes, except the seven months before—take September 25 and subtract about seven months and you will have the right period.

Q. And at least during those periods, subtracting the six and seven months period, you say outside of that period in 1941, 1942, and 1943, Julius was borrowing from you off and on during all that time?

A. Yes, sir, money I had saved, and I was very glad to give him it. I make no denial of this. He and I were quite friendly.

Q. If you will pardon me again on a personal matter, when you came out here you only had about \$900, Mr. Krakauer—\$500 or \$900?

A. Less than that.

Q. Less than that?

A. Yes, less than that.

Q. How much? Can you state how much less?

Mr. Campbell: Objection to as immaterial.

The Court: Overruled.

Mr. Belli: I assure your Honor I will connect it up in all sincerity.

Q. About how much?

A. \$721, to be exact.

Q. And that was when? A. 1932. [89]

Q. When did you loan him the \$3,000?

A. Well, Mr. Belli, the first money I loaned

(Testimony of Julius Krakauer.)

was without his knowledge, really. He was in Canada running his horses and Mr. Hughes and a boy by the name of Al, who was the doorkeeper, a nephew of his by the name of Lawrence, were running the book and it was not doing very well.

Q. This was what year?

A. About, let us say, 1933 or 1934. I didn't know Jules was here. I knew he was here, but didn't even think about it, and happened to run into his place by chance. That is how we renewed our friendship.

Q. You started working for him when?

A. In 1936.

Mr. Campbell: Just a minute, let us finish--

Mr. Belli: I am sorry. Go ahead.

The Witness: The book was not doing so well and I realized it, being a business man. I have saved the \$721 and I had come here and I had been in the chips and out of them and I began to save, as I always did—and I might say, I am not wealthy today nor am I broke by a long shot. But I began saving money and these boys got themselves pretty badly tied up in a financial matter and I phoned Mrs. Wild about the situation and told her what it was and she came over and sat around for a few days trying to straighten it out, but she could not, and showed no disposition to put up [90] any money. I knew Jules for a long time and we had worked together in the War Community Center and I did not want to see that thing go to pot and I loaned the boys \$400, which

(Testimony of Julius Krakauer.)

was a good portion of what I had. When Jules came back he gave me half, I think, and the rest when he returned. But I didn't go to work for him until quite some time after that, I think in 1936.

Q. After you went to work for him, you did not do any other work other than for Julius.

A. That's right.

Q. And he paid you \$10 a day?

A. I think we were on a six basis, then eight, and then ten dollars. It ended at ten, but I don't know just when it began, sir.

Q. When was it you loaned him the \$3,000?

A. Mr. Belli, I loaned him off and on many a time. I will say at one time had all of but \$1,000 of my bank roll, when Seabiscuit won the Santa Anita Derby, because the night before, Friday night, he had to cover all the money. He had to pay off, because it is one of the canons of the trade to be able to pay.

Q. How much was your bank account?

A. I once showed him—there was \$8,000, and I had showed him I had him on the scratch of a pen for about \$7,000, and if something happened when he drove up from Santa Anita, I [91] think I would have had a tough time collecting that from his estate.

Q. About being a follower of the horses, on this Seabiscuit episode that you speak of, when was that?

A. 1940, when Seabiscuit won the Santa Anita

(Testimony of Julius Krakauer.)

Derby, in March—I think it was the 21st they won it. It is 1940, the Santa Anita Derby, anyway. Seabiscuit won when nobody thought he would even go to the post.

Q. And your bank roll had gone up to about \$8,000 in 1940? A. Yes.

Q. What was your bankroll when you lent Julius? A. I don't think I will tell you.

Mr. Campbell: We object to that as immaterial.

The Court: Objection sustained.

Mr. Belli: May we approach the bench on that? I assume your Honor it is vitally material, for otherwise I would not ask it.

The Court: Then you will assure me you will demonstrate the materiality.

Mr. Belli: Yes, I do, Judge.

Mr. Campbell: I think that should be done outside the presence of the jury. The witness apparently has some reluctance that should be protected in his own financial affairs, and it has no materiality here.

The Court: Let us discuss it at the recess time. Pass [92] that and we will discuss it later at the recess period.

Mr. Belli: Yes, your Honor.

Q. As a matter of fact, when you were working for Julius for this \$10 a day you were betting too, weren't you? A. Yes, a little.

Q. Julius had quite a few arguments with you, didn't he, that he didn't want you to bet?

(Testimony of Julius Krakauer.)

A. In the book, and a rule that I never violated, but maybe the others employed by him did—in the book.

Q. And many of his other employees did, did they?

A. Many of his other employees bet in his book. Many bookies don't allow their employees to bet in their book, and I never violated a rule when I work for a man. I always followed his instructions.

Q. You would go outside and bet in some other book? A. Yes, but in a very small way.

Q. By the way, you left there, you agree, on a Saturday? I think I might have a piece of paper here that would refresh your memory, anyhow, it was September of what year?

A. When I left him?

Q. When you left Julius.

A. The 25th of September, 1943.

Q. And you had a conversation with someone whose name begins with "C".

A. Clarence Collard. [93]

Q. You told Mr. Collard you were going to take the paper so he told you you could not?

A. No, I told him I was, and I told him why, that they were in connection with these cards, and Clarence was embarrassed and trusted me. We were good friends. But I told him I wanted him to know this, and he said he trusted me.

Q. He had told you, as I understand it, that it was all right to take some of these things.

A. He did not object to it when I explained why I was taking them. Although I can say—

(Testimony of Julius Krakauer.)

Q. As a matter of fact, Mr. Krakauer, when you left Julius there was quite a stormy session, wasn't there?

A. Yes, if you want to call it that in view of the past pleasant relations.

Q. Wasn't there a question of your taking some money from Julius?

A. Yes sir, that is the reason I left, because he had done or made similar accusations to others and I made up my mind the first time he did it to me, I was not going to be there any longer.

Q. How much did he accuse you of taking?

A. Oh, I don't know, it was—

Q. Roughly—

Mr. Campbell: Let him finish.

Mr. Belli: I am sorry, go ahead. [94]

The Witness: It was mostly concerned with his proposed sleepers.

Q. Roughly, how much did he tell you he thought you had stolen from him?

A. I don't know, but any sum he had mentioned would have made me take the same action.

Q. Was it \$5.00, or more or less?

A. I was holding a good position, and could have made a bond at that time there, or any time, and have made bonds.

Q. Give us the conversation when you left there and Julius accused you of stealing? What did he tell you?

A. He said the difference between the amount of sleepers that were being turned over to him

(Testimony of Julius Krakauer.)

at this time as compared with a few months ago—I don't know, a week or a month ago. were smaller. I called his attention to the fact that he had forgotten that I had suggested to him as good business policy, being a business man, that every now and then we collect some of our better bettors and say, "Here, Jo, Jim, or John, here is a bet you made that you don't know you won and here is the money." I did that many times sir. I called his attention to that and he still persisted that there was no dishonesty and I said, "I am quitting to-night."

Q. From whom else did you hear that he accused you of dishonesty? A. I don't know.

Q. You have no animosity toward Julius?

A. I bear him no ill will.

Q. You bear him no ill will?

A. No, except I wouldn't have liked anybody to make that accusation. I have a pretty fair reputation in the world, I think.

Q. By the way, you are what is called the informer in this case aren't you?

A. I don't know whether you will call it that or not. I don't know anything about that.

Q. Well, whatever we call it, it makes no difference, and I will withdraw that. Are you familiar with the percentage you would get if there would be a fine or recovery here?

Mr. Campbell: Just a minute, that is objected to, as incompetent and out of place.

The Court: Objection overruled.

(Testimony of Julius Krakauer.)

The Witness: I know nothing about that.

Mr. Belli: Q. You know nothing about that?

A. I know nothing about that.

Q. You don't know that you would recover ten to twenty percent for informing?

Mr. Campbell: There is nothing showing that this man knows anything about that.

The Court: Objection sustained.

Mr. Belli: Let us get into that, then, a little further. [96] When you left Julius, there was a big fight there?

A. I wouldn't call it that, sir. He had made the statement earlier in the day, or the night before, I do not remember which, as to his position in this matter about the sleepers, and the next afternoon, just before closed, he said, "Turn those sleepers over to Collard," intimating I was still to work there, and I had explained the conversation we had, and how we had handled it, and showed him in my record the number of bets I turned over voluntarily to people as a matter of good will. He still persisted in it, and of course wouldn't turn these sleepers over to Mr. Collard and continue to work in my regular position. There was not any big row, as you seem to indicate.

Q. Before I forget, Mrs. Wild was asked to put up money and she demurred, she didn't do it.

A. She didn't do it.

Q. She had the cash in the safety deposit box?

A. I don't know anything about that.

Q. What was the conversation with reference

(Testimony of Julius Krakauer.)

to it? A. I called her up—

Mr. Campbell: Just a minute, that is objected to as incompetent, irrelevant, and immaterial and having no bearing on the issue here. [97]

The Court: Sustained.

Mr. Belli: I am going to show the source of funds in the whole audit, your Honor. May we hold that also in abeyance?

The Court: Yes, we might discuss that phase of it also. I intend to allow you considerable latitude in the examination of this witness, counsel, and I will reserve ruling on that.

Mr. Belli: Q. Getting back to these cards, why was it you took them?

A. After I began to consider the possibility that I was in effect what he finally told me I was—mixed up in this tax matter as much as he was—I am sorry I gave those cards to Mr. Callahan. I don't mind telling you that. I was sorry I did that and I wish today I had not.

Q. But on these cards here, you made up your mind to take those before you left there, didn't you?

A. They were there all the time. If Mr. Wild had any desire to get ahold of and destroy them, he could have.

Q. He could have?

A. Yes, sir, they were there in the drawer.

(Document shown by Mr. Belli to Mr. Campbell.)

The Witness: I mean, before I went—

(Testimony of Julius Krakauer.)

Mr. Belli: Just a minute. Let us proceed by question and answer.

Q. Is that your signature there, Mr. Krakauer?

A. Yes. [98]

Q. Is that Julius' signature?

A. Yes, I believe it is.

Q. Was Julius drinking quite a bit in this period of time?

Mr. Campbell: Objected to as immaterial.

The Court: Objection overruled.

The Witness: A. Just before that I think he was.

Mr. Campbell: Q. Will you keep your voice up, Mr. Krakauer?

A. Just before that I think he was, but I am not sure of the dates. He periodically did drink.

Mr. Belli: Q. He periodically used to go on some good ones, didn't he? A. Yes, sir.

Q. And they would last over quite a period of time? A. Yes, they would.

Q. And when he would go on these good ones, who would sort of run the business?

A. I was usually called upon to take care of the finances for him and then I would tell him about it and we would arrange the matters alone.

Q. And by going on a good one, that would extend on how many weeks?

A. Not over two or three weeks. Some of them didn't last that long, but I have seen him on a three-week bender, I believe.

Q. Where would he go on those benders—out of town? [99]

(Testimony of Julius Krakauer.)

A. No, unfortunately he would stay around the place.

Q. Was he intoxicated when he signed this, do you recall?

A. I don't know; I don't think so. His signature is rather shaky. It always has been.

Mr. Belli: We offer this in evidence as our first exhibit in order.

Mr. Campbell: No objection.

The Court: One moment. Is that offered in evidence?

Mr. Belli: Yes, your Honor.

The Court: No objection?

Mr. Campbell: No objection, no, your Honor.

The Court: It may be marked as Defendant's Exhibit A.

(Document dated September 29, 1943 signed by Julius Krakauer and Julius Wild was thereupon marked Defendant's Exhibit A.)

Mr. Belli: (Reading) "San Francisco, California, September 29, 1943.

"To whom it may concern:"

This is signed by you, Mr. Krakauer, and apparently I can not make it out, but it looks like Julius Wild.

Mr. Campbell: I will stipulate it is his signature.

Mr. Belli: (Reading) "This is to certify that the parties whose names are affixed hereto, do affirm that the following is a correct statement:

"I, Julius Wild, do certify that I have paid Julius [100] Krakauer all monies due and owing,

(Testimony of Julius Krakauer.)

either as salary or loan, and that I have received from Julius Krakauer all keys, records, accounts, chattels or other materials to the best of my knowledge.

"I, Julius Krakauer, do certify I have received from Julius Wild all monies due and owing either as salary or loan and I have turned over to him all records, chattels and other materials that belong to him that were in my possession," and then the signatures.

Q. At that time you had purloined or taken, if you prefer, these cards?

A. May I say to you—?

Q. You may say anything you want. We have no restrictions.

A. At that time Mr. Callahan said that he wanted to see me and I told him I would see him at the Day and Night Bank after opening where I had to go anyway, and I signed that statement in the bank.

Q. You did not read it?

A. I did it, and I told Mr. Callahan I excepted specifically the records that referred to the cards I had given him and stated to Clarence Collard on Saturday when I left that I was keeping them.

Q. You have a distinct recollection of telling Mr. Callahan when you signed this statement on September 29, 1943 that you were excepting therefrom these cards which are now Government [101] Exhibit 8, 9 and 7, is that right?

A. Yes, and I told him why, and furthermore, Mr. Callahan told me then as he has told me

(Testimony of Julius Krakauer.)

many times since that I must remember that he was making out Mr. Wild's tax returns and instructions from Mr. Wild.

Q. Which bank was that that this conversation took place in?

A. In the Day and Night Bank, which was just the meeting place. It had no bearing on it.

Q. How did you happen to meet Callahan?

A. I was going down there anyway and he said that he wanted to see me.

Q. That was after—

A. That was after September 25.

Q. Was it after Mr. Wild fired you?

A. It was Saturday night, September 25. It may have been Monday or it may have been Tuesday.

Q. But it was after Mr. Wild fired you?

A. I don't know whether that is dated or not. Is it dated?

Q. Do you recall the episode at the bank being after Mr. Wild fired you?

Mr. Campbell: I object to the question as assuming a fact not in evidence, that he was fired?

Mr. Belli: Q. Well, weren't you fired, Mr. Krakauer? A. No, I was not.

Q. You quit? [102]

A. Yes, because Mr. Wild would have let me go on working if I had taken those sleepers over to Mr. Collard. There was no question about that and the others in the office knew that. I wouldn't work under those conditions.

(Testimony of Julius Krakauer.)

Q. What did you take these cards in, a shoe-box, or what?

A. Those cards for a long time were kept in a locked box to which he had one key, in a box which he wanted to keep things in. So he must have been satisfied with them.

Q. When you first started to work with Julius and set up this system of cards here, whose idea was it, by the way, to set up a card system?

A. I told Mr. Wild if I was to handle the money and be responsible for it I wanted some way of keeping track of it and protecting myself and him too.

Q. Did you keep your own records the same way as this in that place of business?

A. What?

Q. Did you keep your own records the same way as this in that place of business?

A. Mr. Belli, I can tell you any one day, each evening, exactly how I stand in this world. That has been my habit all my life. Of course, I had an expensive business at one time where that was not true, but in my personal affairs I can tell you at the end of every day.

Q. I can not ask you that until after the recess. [103] A. I understand.

Q. With reference to the figures on the cards, you compared the figures you had with the figures Mr. Callahan had, and can you tell us what the absolute figures were on those cards?

A. I don't know.

(Testimony of Julius Krakauer.)

Q. You recall a moment ago when I objected on direct examination that there were some figures Mr. Callahan had produced and you said decidedly that those were not in conformity with the conclusions on your figures. A. Yes.

Q. Could you tell us what the figures were that Mr. Callahan had produced?

A. I don't know. He just called them off. There were two sets of figures on each card as I remember. He called them off. I have no way of telling where he got them or where they came from.

Q. No, we are not concerned with where they came from or where he got them. But you have no idea now what they were. A. No.

Q. But you have a distinct recollection that did not compare with the set of figures that you have?

A. I will tell you why, because Mr. Callahan said they did not.

Q. Then, it is what Mr. Callahan said and not what you recollect. [104]

A. I don't mind telling you that I was rather amused about the whole proceeding and told him, and he said, "Never mind, I am doing just what I am told," and I told him that those figures were not—he said, well, "Put them down, they have to be in your handwriting."

Q. You say you told him those figures were not—were not what? What were they?

A. They were supposed to be the take for every month. There were twelve cards and this was for

(Testimony of Julius Krakauer.)

a year, and this was for the take and expenses. As I remember, there were only two sets of figures on each card.

Q. Do you have any recollection of what they were? A. No.

Q. How could you tell Mr. Callahan they were not correct if you don't recall what they were?

A. Because I kept these other figures every day and I had a pretty good idea when I keep them, that here is a man that brings you an entirely new set of figures and you know pretty well whether they are in line or not. And that is for a month, mind you, and I knew pretty well the take every month, and I knew that was not correct.

Q. I thought these were composite—

A. No, they represented the total figure of each month for the year 1941.

Q. It was the total, then? [105]

A. Yes, for each month take and expenses.

Q. You can not give us an idea of what the total was?

A. I don't undertake to, sir, because I am telling you how they were produced, out of thin air.

Q. Did you see the total?

A. He made me write them. He said they had to be in my writing.

Q. I see. Now we have them in your handwriting. A. Yes.

Q. And you did see them?

A. Yes, on his vacation I put them down.

(Testimony of Julius Krakauer.)

Q. In your handwriting?

A. Yes, they had to be in my handwriting.

Q. And you haven't any recollection whatever what the final single figure was?

A. On each month I don't undertake to remember.

Q. There is no final figure?

A. No, I wish I kept a copy of them, naturally.

Q. Why?

A. Because I would be able to answer your questions far better than I am doing.

Mr. Campbell: Don't volunteer statements.

The Witness: Of course, sir.

Mr. Campbell: Confine yourself to the questions which are asked you by counsel. [106]

The Witness: I am sorry, sir.

Mr. Belli: Q. What sort of records did you keep besides these?

A. None except the record of the sleepers. That is all.

Q. Do you think you could prove what with these records here?

Mr. Campbell: Objected to as incompetent and immaterial.

The Court: Objection overruled.

The Witness: A: I kept those because Mr. Wild wanted to know what his business was doing month to month.

Mr. Belli: I mean, when you told Julius you had given all of the records back to him and kept these, what were you intending to keep these for, to prove what?

(Testimony of Julius Krakauer.)

A. To protect myself against the possibility of being currently involved as he indicated I might be.

Q. How long after the date of September 29, did you go to the Internal Revenue Department with respect to these cards, with these cards?

Mr. Campbell: Just a minute. That is objected to as assuming he went to the Internal Revenue Department.

The Court: Objection overruled.

The Witness: I don't know.

Mr. Belli: Q. Did you go to the Internal Revenue Department, so we will have that?

A. I think it must have been, oh, quite some time after—I don't know, sir. [107]

Q. And you at that time had a deep feeling for friendship for Julius?

A. I don't mind telling you, sir—

Q. And I don't mind hearing you.

A. —that it was not a question of friendship in that case; but I never did feel in view of the amounts of money that I turned over to Julius and kept the books for him, that he had paid his just share of taxes, in fact, less taxes than I did personally, especially as we were then engaged in a war effort in which I had two sons.

Q. When did this great feeling of righteousness strike you, after Julius accused you of stealing?

A. It was before that period. I kept them for my own protection in case I was implicated.

Q. Did you ever go to Julius to tell him that you were disturbed and that you could not sleep

(Testimony of Julius Krakauer.)

nights because of the war effort, and he not paying his just share of taxes. A. No, I did not.

Q. When did that smite you so that you took or purloined these cards?

A. After the fight. I don't admit that I purloined them.

Q. Well, let us say, took them; did this feeling about his dereliction in payment of taxes strike you prior to the fight?

A. Yes, I told him at the time that he came to me that first [108] day that he would have a lot of explaining to do.

Q. What did you tell him to do at that time?

A. I didn't tell him to do anything.

Q. About the war effort, and so forth, did you say something about that then?

A. Yes, I once told him that my contributions to the Red Cross and other charitable efforts in those days were more than his. That is when we had another little row.

Q. How much were his?

A. I have a pretty good idea.

Q. Well, will you be charitable enough to tell us? A. I don't know exactly.

Q. Why, Mr. Krakauer, you must know.

Mr. Campbell: Let him finish his answer.

A. But I know mine were in excess, because I had told him one day, and mine were in excess.

Q. You have no idea what his were?

A. I think they were around \$50, perhaps.

Q. \$50 what?

(Testimony of Julius Krakauer.)

A. This happened to be Red Cross.

Q. Yes, but what year and what period?

A. I wouldn't undertake to say.

Q. By the way, how did he pay to the Red Cross, in cash, check or what?

A. Cash, I suppose. I just asked him. We were discussing, [109] this matter was all.

Q. Which year was this, Mr. Krakauer?

A. It must have been the year 1941, or maybe 1940.

Q. 1940 or 1941?

A. Yes, I couldn't say. Julius and I were friends and like all good friends we got into squabbles once in awhile and I was a little hot-headed and so was he.

Q. We want to keep you good friends, but in 1941, 1942, and 1943, you got into a squabble over the contribution to the Red Cross, and we won't go beyond the limits of relevancy in this, but you recall there was a \$50 contribution by Julius?

A. Yes.

Q. And your contribution was what?

A. About \$30—just in proportion very much greater than his.

Q. You mean in proportion?

A. Yes, in proportion, not actual figures.

Q. Who was present in this altercation?

A. I don't know—probably down there in the evening.

Q. You say "probably", do you have a recollection?

(Testimony of Julius Krakauer.)

A. I don't have a recollection who was in the room. Every once in awhile those things do come up.

Q. As a matter of fact, Mr. Krakauer, don't you know that Julius' contributions to the Red Cross and charity were far in excess of yours?

A. I was only talking about one item. That is the one we had [110] out at the time.

Q. Will you grant us this, that Julius' character in general, and this is not an irrelevancy—wasn't he extremely liberal and generous to people who would come into the betting establishment of his?

Mr. Campbell: I object as incompetent, irrelevant, and immaterial.

The Court: Overruled.

Mr. Belli: Yes or no?

A. I cannot say yes with any enthusiasm because I think a part of it was reputation, Mr. Belli. I think I am justified in that.

Q. What do you mean by that?—"A part of his reputation."

A. Well, some people have a reputation for being generous because they do it with a show.

Q. He had a reputation of being generous, but it is your opinion that he was not?

A. In my opinion, that was not entirely justified to the extent that he enjoyed it.

Q. In fact, it was so to the contrary you chided him for his penuriousness in his donations?

A. I will stand by the statement that he was not entirely justified.

(Testimony of Julius Krakauer.)

Q. We won't pursue that any further except to ask you, does Bob Hughes know about that? [111]

A. I wouldn't undertake to say.

Q. Who knew him best in the business? I would not say who was his best friend, but who knew him best in the business?

Mr. Campbell: I object to that as immaterial.

The Court: I cannot see how that would aid or assist the court and jury in this matter. [112]

Mr. Belli: Shall we take the recess, your Honor?

The Court: Yes, we will take the afternoon recess.

Ladies and gentlemen, I give you the same admonition as heretofore, not to discuss this case among yourselves, nor converse with anyone on any subject connected with the trial of this case, nor are you to form or express any opinion thereon until the case is finally submitted to you.

(Thereupon the jury retired from the courtroom and the following proceedings were had outside of the presence of the jury:)

The Court: Counsel, on these several matters, first with respect to the admissibility of the testimony on that phase of the case, the first question was objected to. What have you to say on that?

Mr. Belli: I have forgotten it, but I have listed three of them.

The Court: Take them up in the order that you desire.

(Testimony of Julius Krakauer.)

Mr. Belli: The first one was when I asked Mr. Krakauer the present state of his assets. I do know and I believe it would be admissible because here are some records that are kept entirely in Mr. Krakauer's handwriting and I am going to show some irregularities, some discrepancies with respect to these records and it is our sincere contention that the motive of Julius Wild in discharging Mr. Krakauer was not entirely without foundation. [113]

(Thereupon argument was had between counsel for the respective parties.)

The Court: At the present time I don't think we should have to try a collateral matter. However, I will allow counsel to interrogate the witness with respect to his financial condition at the time he left the employ of defendant, or an immediate time thereafter. I think we all agree that is certainly admissible.

The second point is what, Mr. Belli?

Mr. Belli: The second point is about Mrs. Wild's money. I have not gone into our defense as thoroughly as I should, but between now and tomorrow I will, and I am going to have to show he borrowed, Julius Wild borrowed from Maxferds and borrowed from Mr. Krakauer and borrowed also from his wife, and I do believe the wife had some cash when they gave her that case out of a safe deposit.

(Thereupon arguments were presented to the Court on behalf of the respective parties.)

The Court: You might pursue that in some other form. I will sustain the objection of Mr. Campbell.

(Testimony of Julius Krakauer.)

Mr. Belli: As to the third point, the question of the proceeds of any recovery there would be in this case and the percentage available to the witness—

The Court: I did not foreclose you on that.

Mr. Campbell: Yes, he answered that already that he did [114] not know.

The Court: You entered an objection to the question, and I overruled the objection, Mr. Belli, and the witness answered.

On the question of the comparative analysis made by the witness with respect to the amount submitted by Mr. Callahan, I overruled an objection and reserved ultimate ruling. My ruling is the same.

Mr. Belli: Of course, there were no absolute figures.

The Court: But the clear purport of the testimony is manifest now. That is my ruling.

We will take a five-minute recess.

(Recess.) [115]

The Court: You may proceed, gentlemen.

(The Witness Krakauer resumed the stand.)

Mr. Belli: Your Honor, I wonder if I might have the privilege of having Mr. Bower, my accountant, sit at the counsel table with me. He is not a member of the bar.

Mr. Campbell: No objection.

The Court: Certainly, that is permissible.

Mr. Belli: Q. Mr. Krakauer, I think that you had told us that you, over this period of time, '41, '42, '43, paid more taxes than Julius did?

(Testimony of Julius Krakauer.)

A. I said I had an idea I did. I didn't say positively I did, sir.

Q. Well—

A. I don't know what he made. I never saw his return, sir.

Q. That was the next question to it, and you had never seen the return?

A. Never saw his returns.

Q. Let's come back to the question—

A. Didn't see the return we argued in question nor any of the others, ever.

Mr. Campbell: Mr. Krakauer, I think we could proceed faster if you would confine yourself to answering the questions and not volunteering information.

Mr. Belli: I have no objection to him saying anything he wants to say. [116]

Mr. Campbell: I prefer to proceed in an orderly fashion.

Mr. Belli: Q. I am permitted to ask you now, Mr. Krakauer, your financial, shall we say, worth when you were fired by Julius—or strike that, and let's put it this way: When you left Julius?

A. I would have to look that up. I can't give it to you out of my head.

Q. You can't tell us—

A. I wouldn't undertake to. I am too careful about figures. I wouldn't do that.

Q. Where would you look?

A. Bank accounts and some investments I have. I would have to go back. I would have to go to the bank and get some statements if I haven't got

(Testimony of Julius Krakauer.)

them. I wouldn't undertake to give you any figures as important as that out of my head.

Q. Well, could you give us any statement as to your net worth at that period of your life when you had left this dear friend of yours?

A. I don't want to do it, sir. I don't think I am justified in doing it.

Q. Well, could you do this? Could you tell us if it was a thousand dollars or \$50,000?

A. It was more than a thousand and not fifty thousand; that is all I will say, because I wouldn't—I have worked with figures all my life, more or less, in big business and little [117] business, personal business and otherwise, and I don't want to do it.

Q. Well, was it big business about that period of time or little business that you were in?

Mr. Campbell: Oh, that is objected to as argumentative.

Mr. Belli: All right.

Q. Haven't you any idea how much money you had when you left Julius?

A. No, sir, I have not. I couldn't undertake—that is five years ago.

Q. Were you broke when you left him?

A. No, sir, I wasn't. I have never been really honestly broke in my life, sir.

Q. Well, then, you are going to look tonight in your records and ascertain how much money at least you had when you left Julius?

A. In 1943?

Q. 1943.

(Testimony of Julius Krakauer.)

A. It wouldn't be all money, it would be, some of it would be investments.

Q. Investments in what? A. Stock.

Q. What stock?

A. Well, I don't intend to—you don't want me to tell you what stock I have—when a person buys a few stocks and sells a few [118] stocks, what I did on that particular date. I wouldn't undertake to do that.

Q. Was your account at the brokerage office as numerous as that?

A. No, I might have had none on that date, because one gets in and out of those. That is an exact date you are trying to fix me to.

Q. Were you trading on the stock exchange as well as betting on the horses?

A. Very small amount.

Q. With whom did you have an account, Mr. Krakauer?

A. Probably Swift & Company, but I wouldn't say as to that date.

Q. Well, what other brokerage accounts, other brokers' offices, did you have accounts with?

A. Just one.

Q. So if you had an account with anyone, it would be Swift & Company on that date?

A. I am not sure of that, sir.

Q. Do you deal with any other brokerage accounts, yes or no? A. At that time?

Q. Yes, during the years from 1939, whatever the period was there, up to '43.

(Testimony of Julius Krakauer.)

A. There was, it might have been a concern that was on the corner of California and Bush, whose name I can't even recall. [119] They are out of business now.

Q. Well, they would be out of business if they were on California and Bush.

A. Well, they were on—oh, I mean California and Montgomery. Did I say Bush? I am sorry.

Q. Moulton, or Blythe? A. No.

Q. Barth?

A. I will have to look it up for you; I will be glad to.

Q. All right, but you are going to tell us at the beginning of tomorrow's session, about what your assets were in 1943, in September, will you?

A. Yes, sir. If I can get them overnight. I will be glad to, very glad to.

Q. You have your income tax returns for that year, don't you? A. Yes.

Mr. Campbell: I submit that that is a non sequitur. Income tax returns do not reflect net worth.

The Court: The objection is sustained.

Mr. Belli: Q. They might reflect your income, hmm? A. Oh, they would, naturally.

Q. I don't know how "naturally", but will you look and see?

A. As far as I am concerned, they would.

Q. We won't pursue that any further. Do your best on that. Now, with reference to these tickets—Now, as I understand you, [120] Mr. Krakauer, you left Mr. Wild, and when you left him you had these

(Testimony of Julius Krakauer.)

tickets and you took those to the Internal Revenue on what date? A. I don't know, sir.

Q. Well, about when?

A. I really couldn't answer definitely. I don't want to answer indefinitely. You are tying me down to a date I don't know.

Q. No. I am only asking you to do what all of us try to do in recollecting past events; give us your best recollection.

A. Let me look that up for you, too. I might have some memorandum on that, too. I don't know.

Q. Do you keep memorandums of these things?

A. Well, in most matters that are important, especially with reference to finances and other things, I do. Other things I don't bother about.

Q. Would you be good enough to bring any memorandums you have tomorrow with reference to when you went to the Internal Revenue, anything with reference to how much money you were making, and anything with reference to finances in '41, '42 or '43? Would you do that?

A. You want—Well, you want to know what?

Q. I want all the memorandums that you have during those years, of your financial transactions. Would you bring them?

A. They wouldn't, they would be just merely bank accounts. [121] I will tell you what I was worth. You want to know what I was worth on September 25, 1943. I will be glad to tell you that, sir.

Q. All right. And if you have memoranda,

(Testimony of Julius Krakauer.)

would you bring those tomorrow? I mean, you say you will have memoranda?

A. No, I am not going to bring any substantiating evidence unless I am ordered to with reference to my bank account and all that. I will give you a statement of my worth on September 25, '43, which is the date on which I left Mr. Wild's employ. I will be glad to do that. I have nothing to hide.

Q. With reference to the memoranda that you might have at the time that you went to the Government, do I understand that you did keep a memorandum or write a memorandum?

A. I don't know. I am just telling you that I might have it. I will be glad to tell you if I can find it.

Q. Where would you look?

A. Oh, I have a file.

Q. What is the file called?

A. Oh, just a personal letter file or something. I may have it. I would rather give it to you exactly, rather than guess at it.

Q. But you don't know whether you have it or not, now? A. No, sir, I don't.

Q. Well, do you have a recollection if you did make such a memorandum? [122]

A. I am not, I wouldn't say as to that either.

Q. Were you in the habit of making memoranda about these things?

A. I don't make memoranda about a good many things, important things of that kind.

(Testimony of Julius Krakauer.)

Q. See if you can find that and bring that to us.

A. O.K.

Q. As I understand it, then, these records that you brought—by the way, the figures that were on the cards for Mr. Callahan were only pertaining to 1941, weren't they? A. That's correct, sir.

Q. Yet you took '42 and '43, up to the time that you were there—

Q. Well, the reason I took '42, because Mr. Callahan came to me, also on Mr. Wild's request, and asked me to make up a similar set of cards when he was making Mr. Wild's '42 return, and I refused to do so.

Q. When was that?

A. That was whenever Mr. Callahan, that was probably before March 15 of the following year.

Q. He asked you to do what, to make up what?

A. Make up a similar set of cards, the same as I had with reference to '41, and I refused to do so.

Q. Who was present during that conversation?

A. Mr. Callahan and myself. Mr. Wild had asked me to see Mr. [123] Callahan about it. I didn't even know what Mr. Callahan wanted, and then he told me and I refused to do so.

Q. Was there a duplicate set made up?

A. No, no, that was with reference to '42.

Q. Well, the one that, if I remember correctly, is this copy in your own handwriting—you did copy some figures?

A. That had reference to the return of '41, which was requested in '43 by someone from the Internal Revenue.

(Testimony of Julius Krakauer.)

Q. Well, when you were making those, did you think that you would be brought in by the government on income tax matters?

A. No, but I didn't know how culpable or criminally involved in the matter I was.

Q. Did you think then that you were helping Julius defraud the government?

Mr. Campbell: That is objected to as immaterial, what he may have thought. The ultimate question is what he did.

The Court: Overruled.

The Witness: What is the question?

Mr. Belli: Q. When you were making up, as you say, this list of cards, containing these numbers that Mr. Callahan gave you, did you think when you were doing that that you were helping Julius defraud the government on income tax?

A. I had reason to believe that those figures were being used, and that they were not correct, and if there was any question about his income, I certainly was a party to it, if there was [124] any deficiency or question about that particular return, I was certainly a party to it, my making up these cards.

Q. And yet you stayed with Julius until September of '43, a couple of years later?

A. No, this was in '43, sir, just a few months after that. This question came up in '43 with reference to the return of '41, and it was only a few months after that.

(Testimony of Julius Krakauer.)

Q. In '43 you were going to make cards up for '41?

A. No, I didn't make up any cards, they were already in existence.

Q. But as I understand it, you took some figures from Mr. Callahan in '43 and made up cards for '41?

A. Yes, these 12 cards, about, only, which Mr. Wild asked me to make up to substantiate a return of his income tax in '41 which was being questioned in '43.

Q. Mr. Krakauer, anyone having these cards in their possession could change these in '44, '45, '46, to reflect something in 1941 or '42, couldn't they?

Mr. Campbell: Just a moment. Objected to as argumentative.

The Court: Sustained.

Mr. Belli: Q. Didn't you change a couple of these cards, Mr. Krakauer?

A. No.

Q. What? [125] A. No.

Q. Sure of that?

A. I am. I might have changed it, purely as a matter of correction of arithmetic, but not as to fact or accumulation, because—

Q. When did you change it, probably as a matter of arithmetic, all these cards, after you signed this paper with Mr. Wild that you didn't have these cards?

A. I would have to change Mr. Hughes' figures, too. I don't think you will find any change in Mr. Hughes' figures there.

(Testimony of **Julius Krakauer.**)

Q. I understand you to say that you might, as a matter of arithmetic?

A. That is during the time—

Q. They are finished?

A. During the time I was—

The Court: One moment. Counsel hasn't finished his question.

The Witness: Sorry.

Mr. Belli: Q. I understood that you said you might have changed some of these cards—

A. I did not change a card.

Q. I would like to finish my question, Mr. Krakauer, if you will grant me the courtesy. I understood you to say that you might have changed certain arithmetic in these cards; I understood that was after—if it is on this paper—September 29, [126] 1943. Is that right or wrong?

A. I say this, that if there are any corrections of those weekly cards, 52 weekly cards, they would only be corrections as to an error in arithmetic, addition, subtraction or something of that kind.

Q. When did you make any of those corrections?

A. At the end of the week because I went—I always balanced from the first of the week the accumulations to the end; if there was any discrepancy, why, I had to make the correction because I started with a certain amount of money, it was added and deducted from it, and at the end of the week the accumulation had to balance, sir.

Q. But you started from scratch and afresh on the following Monday, didn't you?

A. Yes, sir, whatever was left. Then that week

(Testimony of Julius Krakauer.)

had to balance again. Each week had to balance.

Q. But there was no running account from Friday to the following Monday; in other words,—

A. There was—

Q. All right, you go ahead.

A. Pardon me, go ahead, I am sorry.

Q. It only went as far as the week. In other words, you would run from Monday to Friday or Saturday, and then you would stop and then start an entirely new set of figures, wouldn't you, the following Monday? [127]

A. No, sir, the figure of the money on hand was carried over to Monday.

Q. Well, wasn't it always \$300 that was carried over to Monday? A. Not always.

Q. By the way, how many other employees did Mr. Wild accuse during this period of time, of stealing? A. Well, two, I believe.

Q. Did he fire those, Mr. Krakauer?

A. He—

Q. Yes or no. A. No.

Q. You were the only one?

A. He didn't fire me, I quit.

Q. You were the only one that quit, let us put it that way. A. Yes, sir.

Q. After an accusation of stealing, right?

A. Yes, sir.

Q. What? A. Yes, sir.

Q. Thank you.

A. Which involved only a matter of about three weeks' time, however.

(Testimony of Julius Krakauer.)

Q. Now, coming back to these figures again, you don't contend, do you, that you understand what Mr. Wild made by way of income [128] or lost during the period '41, '42, '43? Your answer is no? When you shake your head—

A. No, sir, except what those figures show, that he made in that particular operation.

Q. All right. Now, all of the cards are not here, are they, for these three years?

A. Only the accumulated cards for each week; the others were always destroyed, even the ones that I—totally destroyed, completely sir.

Q. But you can't go through here and get the number of weeks that he was open, can you?

A. Yes, you can get the number of weeks.

Q. There is a card for every week that he was open?

A. Except there is one set there that has a period of several weeks where we just kept a sketchy memorandum that, when the place was closed. You will find the cards.

Q. That was closed, but partially open at times?

A. Yes, sir.

Q. All right.

A. Well, the whole thing didn't amount to anything, the cards will show that.

Q. Now, I think you told us that about 90 per cent of Mr. Wild's business was done in the room, isn't that correct? A. I should say—

Q. By the "room" we refer to— [129]

A. Well, I should say—

(Testimony of Julius Krakauer.)

Q. Will you let me finish, Mr. Krakauer, please? Ninety percent of his business, you tell us, was done in the room, and by "the room" you mean the place that reflects itself in this business and these cards?

Mr. Campbell: Now, just a moment. I am going to make an objection. I think the vice of these questions and the interruptions of the witness are produced by counsel making a flat statement and then appending some question to it, so that the witness attempts to correct the first statement.

The Court: The question is clear, I think. Do you understand that question?

The Witness: Well—

Mr. Belli: It is a leading question.

The Court: This is cross examination.

Mr. Belli: Q. I mean, I don't want to throw you on that by the form of it. Let's try it again. So the jury will understand, and we will all understand. We have gone this far: Mr. Wild has had a book down there in the basement of the Orpheum or wherever it was done there, and he had a system of bookkeeping whereby he kept a running account through the week here of whatever expenses he had, the janitor, part of the rent he put on there; he would start in with so much money and then at the end of the day pay out the rest of that, and he would take his profit out of it. It was his bookkeeping for his [130] business. Now, that is all the business that you knew about, in other words, the booking over the counter there, hmm?

(Testimony of Julius Krakauer.)

A. In addition, I knew something about his personal affairs, such as he discussed with me.

Q. All right. In addition—let's leave the personal affairs out of it for the time being. In addition to this part of the booking business over the counter there, didn't he himself do a great deal of betting and didn't he cover bets with other bookmakers, like the insurance companies reinsure when they get too heavily involved, didn't he do that when he had too heavy a bet, didn't he do a lot of telephone work?

A. He didn't lay off, except very exceptionally, sir.

Q. All right. Well, let's put it this way: Regardless of the amount that he did outside of that in the room, reflected by the cards, how much it was and whatever it was, you knew nothing about that, did you?

A. Yes, sir, I would know.

Q. You would know?

A. That is, because it was put into the books in the form of a bet.

Q. It was put in here, is that right?

A. Yes, sir.

Q. All right. By the way—

Mr. Campbell: Let the record show that at the time the witness answered the question, counsel picked up and had in his [131] hand, so that the witness might see it, what is United States Exhibit No. 7.

The Court: That may appear in the record as an accurate statement of fact.

(Testimony of Julius Krakauer.)

Mr. Belli: Q. He was going to Caliente, wasn't he, during that period of time, every weekend?

A. In '43, I am not quite sure, but he did for quite a while, go down to Caliente.

Q. And he has got a lot of losses down there in Caliente you know nothing about, right?

Mr. Campbell: I object to the question in that form, if the Court please.

The Court: Sustained.

Mr. Belli: Hmm?

The Court: The objection is sustained.

Mr. Belli: I am sorry, your Honor.

Mr. Belli: Q. Well, did you know or—withdraw that. Where would it reflect in here, his plane expenses to go down and back, and the hotel and the rest of that? A. It would be in there.

Q. Where would it be?

A. I don't know, sir.

Q. You don't know anything about that, do you?

Mr. Campbell: Let the record show the witness shook his head. You will have to speak audibly. The reporter can't get a shake of your head.

The Witness: Okay.

Mr. Belli: Those didn't come in.

Mr. Campbell: I didn't get that.

Mr. Belli: I say, those didn't come in. Those were all losses. Those are just the stubs.

Mr. Campbell: Well, I couldn't testify as to those.

Mr. Belli: Q. Now, with reference to Julius'

(Testimony of Julius Krakauer.)

betting down in Tijuana, did you know that he bet heavily down there?

A. I have never been to Tijuana in my life, or know when he was there, so I wouldn't know.

Q. Well, haven't you heard him discuss when he came back about heavy betting down there?

Mr. Campbell: Just a moment, objected to as incompetent.

The Court: Overruled.

Mr. Belli: Q. Your answer is "Yes"?

A. He often mentioned about his betting down there.

Q. I said "heavy betting". A. Yes. [133]

Q. By "heavy betting" what are these, \$50 tickets (handing to witness)?

A. I don't know much about these.

Q. Well, you know what a ticket looks like on a horserace track, don't you?

A. Oh, yes, these seem to be \$50 tickets, and there is a \$15 one, and there's — I don't know whether that is a \$100 or a \$200.

Q. Let's see, here's a \$100 and a \$200—I have never seen one, myself.

A. There is a couple of five—

Q. That is a hundred?

A. Hollywood. Here's another at Hollywood. He went down there and bet quite a bit, didn't he, in Hollywood, didn't he?

Mr. Campbell: Just a moment, I am going to object to this as being misleading. There has been no foundation laid for these tickets. The question

(Testimony of Julius Krakauer.)

implies that these tickets apparently relate to bets by the defendant, and bets at certain places. The witness has said he has not been present at any time, and I object to the last question as being misleading, if the Court please.

Mr. Belli: Well, I will withdraw it, your Honor, and wait until we put the defendant on the stand.

The Court: It may be in form; however, as I indicated, [134] I will not circumscribe the examination of this witness. I am going to allow considerable latitude.

Mr. Belli: Thank you, your Honor.

Mr. Campbell: May those tickets that were shown the witness be marked for identification?

The Court: They may be marked for identification.

Mr. Belli: We want to keep them in an envelope.

The Clerk: Defendant's Exhibit B for identification.

(Tickets referred to above were marked Defendant's Exhibit B for Identification.)

Mr. Belli: Q. What I am trying to do now, Mr. Krakauer, is to establish and enlarge the magnitude of this betting business of Julius. It consisted of more than one place there at the bottom of the Orpheum Theatre, it consisted of Julius, himself, going to racetracks here, Hollywood, and in Mexico, and betting and in making up tickets for other people, didn't it?

A. I wouldn't be able to say.

(Testimony of Julius Krakauer.)

Q. Well, how many times was he away from the place over here during the years, say, '41, '42 and '43? Wasn't it considerable?

A. Well, he didn't—in '40 he attended the entire meeting at Santa Anita. That is to say, not every weekend. And sometimes he would stay a week or so.

Q. And when he went down there, he went down there for the [135] purpose of making book and betting, didn't he?

Mr. Campbell: Objected to as calling for this witness' conclusion.

The Court: Sustained.

Mr. Belli: Q. In any event, whatever happened down there and at the other tracks, and whatever happened on Julius' other operations, doesn't reflect itself in these cards? Your answer is "No"? A. No.

Q. And you know nothing about that?

A. I do not, sir.

Q. As to whether he won or lost or what?

A. Except from such hearsay as one hears around an office on operations of that kind. That is all. Everybody hears things in business.

Q. Well, I will chance it; what hearsay did you hear about whether he lost or won?

Mr. Campbell: That is objected to, if the Court please.

The Court: Sustained.

Mr. Belli: All right.

Q. By the way, did Julius pay Social Security on his employees?

(Testimony of Julius Krakauer.)

A. Not at first, when I was employed by him.

Q. Well, did he get straightened up and pay it later on?

A. Yes, Mr. Callahan straightened it up for him.

Q. Paid Social Security on everybody there and withholding [136] and the rest of those things, just like it were a bank?

A. As far as I know; it was an operation that called for Social Security, so I suppose she did all the necessary things.

Q. Who did you say you went to first with these cards, Mr. Krakauer? A. I didn't say.

Q. Will you? A. What?

Q. Will you? A. No, sir.

Q. You won't?

Mr. Campbell: Well, now, just a moment, is there a question before him? The question hasn't been asked who he went to.

Mr. Belli: Well, I will ask it then.

Q. Who did you go to, Mr. Krakauer, first, with these cards?

A. I don't remember the man's name.

Q. Well, where was he?

A. Internal Revenue Office.

Q. And when you went up there, at any time did you go up there and tell them that you had had bad blood between yourself and Julius?

A. I did not, sir.

Q. And you are going to find out tonight how long it was after you left Julius that you first

(Testimony of Julius Krakauer.)

went up to the man at the [137] Internal Revenue, right?

A. I will; I will endeavor to give you the exact date.

Q. Did you look up anything about an informer's fee before you went up there?

Mr. Campbell: Objected to as incompetent and immaterial.

The Court: All right, proceed, counsel.

Mr. Campbell: I have an objection to the last question.

The Court: The objection is overruled.

Mr. Belli: Q. Did you look up to see if you would get an informer's fee if Julius got a conviction? A. I did not, sir.

Q. Since then have you heard something about that?

Mr. Campbell: Same objection, objected to as immaterial.

The Court: Overruled.

A. I have not, sir.

Q. You don't know anything about that as you sit there on the stand, what you would get?

A. No, sir.

Q. Did you discuss it with anybody?

A. No, sir.

Q. Did the Government discuss it with you?

A. No, sir.

Q. Are you sure about that?

A. I believe I am sure.

(Testimony of Julius Krakauer.)

Q. What do you mean, you believe you are sure? Either you [138] are sure or you are not. Now, what is it? A. I am sure.

Q. You are sure now? A. Yes, I am sure.

Q. Didn't Julius spend a great deal for entertainment around the place there that didn't go into these cards?

Mr. Campbell: May I have that question, Mr. Reporter? I am sorry, but I didn't hear it.

(The reporter read previous question.)

A. He did some entertaining. We used to have a social card game down there every now and then, but outside of that, I don't think there was any expense to amount to anything, nor did that amount to anything. But if it was, it isn't on those cards.

Q. And with reference, so that we will be clear, to those telephone bets and on the covering that Julius made when the bet was taken in and it was a little bit too large to handle, do I understand your testimony to be that those bets reflect themselves in these cards?

A. Yes, they were not always made by Julius. When Julius wasn't there, Mr. Hughes and myself decided whether our position was too strong on a horse and make a lay-off. But it didn't amount to but just a few dollars.

Q. But there were no coverings outside, that were made by Julius or anyone else, but that they appeared in these cards? [139] A. No.

Q. You are positive of that, sir?

(Testimony of Julius Krakauer.)

A. I believe I am, sir. Of course—yes, I am positive.

Q. Now, you say—withdraw that. Did the establishment run there six days a week throughout the entire year of '41, or could we go through these cards and determine how many days it was open—a card for each day?

A. I think '41 is the one where there was a couple of months there, April and May, that were tight. They were closed.

Q. But if I would go through these three stacks here, I could pretty well tell how many days it was open for these three years, right?

A. Yes, sir.

Q. All right. Did Julius, himself, make any entries at any time on any of these cards?

A. There is nothing in his handwriting on those cards.

Q. Did Julius at any time himself direct you to make any specific entries on those cards?

A. He told me to keep a record, and he saw the cards, knew what was on them.

Q. When would he see them?

A. He would see them every day, in order to determine what the gain was, and to pay the bonus, if any, owed, which would be called for, of a profit over a certain amount. He would have to see it. [140]

Q. Did he at any time tell you to change any of these cards? A. No, sir.

(Testimony of Julius Krakauer.)

Q. Now, you do recall occasions when you changed figures that weren't mathematically correct, is that right?

A. In a very slight amount, just merely to make the bookkeeping or the accounting correct.

Q. Was that before or after Julius looked at it?

A. It would be before, if it amounted to anything, but a few cents; because we had, Mr. Hughes and I always balanced, just to the figure.

Q. With reference to the bonus that was paid at the place, there, how was the bonus arranged between the employees?

A. It was based on so much over \$100. If he made over \$100, why, he paid.

Q. Then every one of the employees participated in the bonus?

A. Yes, sir, I think they participated equally. I am not quite sure of that, however. I wouldn't want to say.

Q. On the subject of being raided there, as a matter of fact, wasn't the place raided 22 times?

A. Well, I told——

Mr. Campbell: Wait a moment, what period of time are you referring to?

Mr. Belli: Q. At least during the period of these cards, here?

A. I said eight or ten times, and I qualified that by saying [141] it would naturally be a guess, because that is a pretty hard question to answer definitely.

Q. And all of the expense for the raids and the rest of those items that you spoke about this

(Testimony of Julius Krakauer.)

morning, they all appear on some sort of a pictograph on here, is that right?

A. Yes, sir, they do. In fact——

Q. Now, you say that in the early part of 1943, someone from the Internal Revenue came down and asked Julius to go to the Internal Revenue?

A. No, he came down and Julius wasn't there, and he talked to Mr. Hughes.

Q. And didn't he talk to Julius at all then?

A. Not then, sir. I was there, so I would have seen him if he had come back and talked to Julius, and I didn't see him talk to him.

Q. Well, then, when the Internal Revenue man came down there, eventually he came over to you—that is, Julius came over to you and said he had to bring his cards to the Internal Revenue?

A. No, sir.

Q. Well, didn't he take some figures up there?

A. Well, the man came in there, and Mr. Wild was not there, and being a stranger, I looked over there and he was talking to Mr. Hughes. Later on, Mr. Hughes came over to me and said that that was a man from the Internal Revenue, and he was questioning a '41 return of Julius'. [142]

Q. Weren't you told then to get some figures?

A. Not by Mr. Hughes; he wouldn't tell me.

Q. Well, did Julius tell you to get some figures?

A. No, the question of getting some figures to substantiate that return was Mr. Callahan, the twelve cards I have mentioned before.

Q. That is the time of the twelve cards, is that

(Testimony of Julius Krakauer.)

right? A. Yes, sir.

Q. And that was before Mr. Wild went up to the Internal Revenue? A. Yes, sir.

Q. You are positive of that?

A. I didn't see him go or anything, but Mr. Callahan did ask me to make up these cards, and told me the purpose of them.

Q. But you are positive the incident occurred prior to Mr. Wild or Mr. Callahan going up to the Internal Revenue?

A. I am quite sure, sir.

Q. No question on that?

A. Well, now, what they did——

Q. "Yes" or "No."

A. I say to you that Mr. Callahan told me the purpose of the cards, so I imagine it must have been before.

Q. I thought you recalled Mr. Wild coming back from——

A. Well, did he come back? That is not the same day. It was Callahan that made this up, probably submitted that to [143] this gentleman, whoever it was, that came down there; and that he and Mr. Callahan came back very much elated with what they had accomplished. In fact, Julius told me they had, that is all.

Mr. Belli: May we take a recess, your Honor?

The Court: We have reached the recess time.

Ladies and gentlemen of the jury, we will adjourn this case and recess until tomorrow morning at ten o'clock, and may I again admonish you not

(Testimony of Julius Krakauer.)

to discuss the case, nor form or express any opinion thereon, until it is finally submitted to you for decision. You may now retire. I have a report from the grand jury. This jury may retire.

(Whereupon an adjournment was taken until tomorrow, Thursday, August 12, 1948, at 10:00 o'clock a.m.) [144]

Thursday, August 12, 1948, 10:00 o'Clock a.m.

The Clerk: United States of America vs. Julius Wild, on trial.

Mr. Campbell: Ready.

The Clerk: You may proceed.

JULIUS KRAKAUER

recalled, previously sworn.

The Clerk: Julius Krakauer, the witness on the stand, has heretofore been sworn.

Cross Examination (Resumed)

Mr. Belli: Q. Mr. Krakauer, have you been able to ascertain your assets at the time you left Mr. Wild?

A. Yes, sir. I have it here.

Q. They were what? A. Here it is.

Q. That's all right, sit down. A. Yes.

Mr. Campbell: May I see that, too?

Mr. Belli: Yes.

The Court: May the records show that the documents were presented by the witness, have been produced voluntarily by him and under no compulsion on my part.

(Testimony of Julius Krakauer.)

Mr. Campbell: And also, may I request that the document [145] that has been produced be marked for identification as the Government Exhibit next in order.

The Court: So ordered.

The Witness: Your Honor—?

The Court: Yes.

The Witness: May I ask this question?

The Court: Yes:

The Witness: I have some substantiating documents and I would like to present them in support of that with the proviso that the people involved, the brokers and banks, be not subpoenaed here.

The Court: Counsel are entitled to interrogate with you. We will see what the examination develops.

The Witness: Yes, sir.

(Documents showing assets for Julius Krakauer, Government Exhibit 11 for identification.)

Mr. Belli: Q. Mr. Krakauer, you hand me a piece of paper here saying your assets on September 25, 1943, were, "Cash—\$2687; Savings Account—\$5000." Where was the savings account?

A. Bank of America.

Q. Which branch?

A. Number 1, Day and Night.

Q. Powell? A. Yes, sir. [146]

Q. "Merrill, Lynch Credit—\$534." Was that a cash or stock credit?

A. That was a cash credit.

(Testimony of Julius Krakauer.)

Q. "Stox on hand, \$1410." And you are going to give us a list of those stocks, as I understand it, and when they were bought? A. Yes.

Q. And defense bonds bought in 1941?

A. Yes.

Q. And Victory Bonds bought in 1942?

A. Yes.

Q. \$3875? A. Yes.

Q. Your assets, as you say here, were \$13,506.64, is that right? A. Yes, sir.

Q. On this amount here, \$506.64, is that right?

A. Yes, sir.

Q. And this amount here, you made out of your \$10 a day with Julius, with what you had saved over and above your living expenses, is that right?

A. No, I should like to say that involved in this amount, of, say, from 1934 on, there must be taken into consideration a sale of a certificate of interest in a South West Irrigation Cotton Association Pool, amounting to some \$600. [147]

Q. Outside of the \$600—

A. Now, wait a minute.

Q. I am sorry. You will correct me any time.

A. I came here with three pieces of jewelry and I had three Swiss watches which were very popular in the twenties, one of which I still have; and one very nice necklace, which I sold to a Mr. Randolph, then doing business upstairs next to the Emporium. He is now on the corner of Stockton and Post in the jewelry business. Mr. Randolph took a fancy to the watch, and paid me a good price for it for

(Testimony of Julius Krakauer.)

his own use. And he took also the necklace off my hands and that amounted to some \$700, the exact amount I cannot state. I also left in my home town a library of considerable volume stored in the El Paso Public Library. It deteriorated because of dampness, and I was compelled to sell it, and I sold it for \$400 and some odd amount. I got a few dividends from the stocks. I also had traded some First National Bank Stock of El Paso, Texas, for some Mexican Agricultural Bonds which I sold partially through W. R. Walker, and Company, of Dallas, and also through Meyer and Company of Mexico City. Although I did not collect the entire amount from Walker because he practically failed, I did collect from Meyer because I had sold those directly under draft, and I got around \$640 out of those two transactions. All of that must be added into that. I cannot give you the exact dates, but it all accumulated within [148] that period which was added to my earnings over and above what I received as salary.

Q. That which you say you want to include in there ran to around \$2000 in rough figures.

A. I haven't added it up.

Q. So the balance would be \$11,500——

A. And added——

Q. Mr. Krakauer, let us get started correctly today, please. Let me finish the question before you answer. Otherwise, it is hard on all of us, and particularly the reporter. Will you bear that in mind?

(Testimony of Julius Krakauer.)

I don't mean to admonish you, but if you will, we will get along a little faster.

A. Yes, I am sorry.

Q. You then earned and saved while you were with Julius, around \$11,500?

A. I wouldn't—I didn't get top salary at first. I wouldn't undertake to say how much I got in salary.

Q. You got less than \$10 a day? A. Yes.

Q. But at any event, you have handed me here a statement of over \$13,000 and we subtract around \$2000 in assets you had or converted, and that leaves about \$11,000, is that right, that you had surplus from your earnings with Julius?

A. No, that is not correct.

Q. You correct me. [149]

A. Because I had some money when I went to work for Julius.

Q. \$700?

A. No, that was in 1932 when I first came here and I did not go to work for Julius until 1936.

Q. How much did you have when you went to work for Julius?

A. I wouldn't undertake to say. I will look that up for you, if you want me to.

Q. Well, you could look that up too. You were planning to give us all your statements today.

Mr. Campbell: I object to that——

Mr. Belli: I withdraw it.

Q. Were these original figures, or did you take those off of something?

(Testimony of Julius Krakauer.)

A. I took those off of something. Here they are.

Q. Could I see what you took those off of?

A. Yes, here is Merrill-Lynch and Company. The reason I brought three of them was because I wanted to bring those along in the regular order.

Q. Mr. Krakauer, if you will, please, just answer the question and let us speed this along.

A. There is September.

Mr. Campbell: Let the records show the witness has handed counsel a document purporting to be a statement from Merrill, Lynch, Pierce Fenner, and Bean, and bearing date of September 24, 1943. [150]

Mr. Belli: Let us put them all in as one exhibit. That would be the easiest thing to do.

Q. Have you any more, and we will put them all in as one exhibit?

A. Here is my bank statement, which I put down in exact amount. I wish to call your attention to the fact that I did not have the September statement. They sometimes fail to send me one, but I have the October statement.

Q. What else have you in your hand?

A. This is another one, but this one is way back in July.

Q. Don't you keep any records in a little book or something?

A. What is that?

Mr. Campbell: Just a minute, that is objected to as incompetent, irrelevant, and immaterial.

The Court: Objection overruled.

Mr. Belli: Q. Don't you keep any records in a little book or something?

A. No, sir.

(Testimony of Julius Krakauer.)

Q. I understood you to say, or I may be in error on this, that yesterday you were telling us that you could say as to almost any day to what you had exactly.

A. Yes. I just carry my brokerage account from month to month on the brokerage statement that you have there, and then my bank account is, of course, of it self evidence, and that is about all there is. [151]

Q. Where was your safe deposit box?

A. In the Day and Night Bank, sir.

Q. What did you have in the safe deposit box?

A. My bonds.

Q. What else? A. My will.

Q. What else?

A. A burial contract which takes care of me if I kick off.

Q. What else?

A. A note for \$500 loaned to a friend, and that is about all.

Q. How about Swift & Company—weren't you dealing with them?

A. That amount right there was transferred from Swift and Company a month or two before I began doing business with Merrill. That is Swift's stock right there.

Q. Were you playing the market at the same time you were playing the horses in 1941, 1942, and 1943? A. I don't play the market.

Q. I am sorry—"invest"—"play" was an inapt term on my part. Were you investing in the market?

(Testimony of Julius Krakauer.)

A. Only to an extent. It was very limited. That is certainly, as you can see, limited, in the groups of tens.

Q. I see here Socony Oil, Columbia Gas National Dairy, Pennsylvania Railroad, and United States Gas——

A. Yes. [152]

Mr. Belli: We will introduce this in evidence as one exhibit next in order.

Mr. Campbell: To which we object as immaterial and irrelevant. I think counsel's inquiry has defeated itself at this time. It has no materiality in this case.

Mr. Belli: As to whether inquiry has defeated itself, I submit, is ultimately for the Jury to decide.

Mr. Campbell: I withdraw that, but I make the objection the ground incompetent, irrelevant, and immaterial.

The Court: Objection overruled.

(Thereupon United States Exhibit 11 for identification was withdrawn and given the number Defendant Exhibit C in evidence.)

Mr. Belli: Q. Mr. Krakauer, when was the last time that you saw the twelve cards that you spoke of yesterday?

A. After I made them out at the dictation of Mr. Callahan and handed them to him, I never saw them again.

Q. You never saw them again after that?

A. No, sir.

Q. You are positive that Mr. Callahan told you what to put on those cards?

(Testimony of Julius Krakauer.)

A. Unquestionably.

Q. And Mr. Wild never told you what to put on those cards?

A. No, sir. He asked me to see Mr. Callahan and to do this little favor for him. [153]

Q. Was it in 1943 that your finances were in such a state that you could loan Julius—what was it, 7 or 8 thousand dollars?

A. That was in 1940, but that took practically all I had over night, fortunately.

Q. And Julius' finances were so bad at that time that he was broke, wasn't he? Do you know?

Mr. Campbell: Objected to calling for the conclusion of this witness.

The Court: Objection sustained.

Mr. Belli: I withdraw it.

Q. When he came to you and borrowed, was it \$8000?

A. May I be permitted to explain to you——

Q. I would appreciate it if today you would just answer the question, Mr. Krakauer.

The Court: Answer the question, please.

The Witness: Yes, sir.

Mr. Belli: Q. Did you then loan him \$8000?

A. I did not loan him \$8000; I advanced it to him on a phone message from Santa Anita.

Q. But it was \$8000?

A. Not quite \$8000, \$7000.

Q. What did he tell you when he asked you for that money?

(Testimony of Julius Krakauer.)

Mr. Campbell: Objected to as incompetent.

The Court: Objection overruled. [154]

Mr. Campbell: May further state, Your Honor, that it has been shown here that this was a matter in 1945 to the period set forth in the indictment? It could have no bearing on the business here in question for the years 1941, 1942, and 1943. It is not impeachment.

The Court: It may well have, counsel. I cannot interpret at this stage of the evidence the vicissitudes this case may take. I indicated I will allow considerable latitude in examination of this witness, and I think you understand my reasons underlining my ruling.

Mr. Campbell: I do.

The Court: If the materiality does not appear, I will strike it from the record.

Mr. Belli: Q. Will you answer the question, then, please? A. What was the question?

Q. Will you read the question, please?

(Question read.)

A. He phoned me from Santa Anita and told me that until such time as he came here, would I take care of the bets that appeared for payment in the winter book. He had run on the Santa Anita handicap.

Q. Didn't he tell you he was cleaned out by that race that Seabiscuit was in?

A. He told me that he had sold a half interest, or Mr. J. F. Waters, Jimmie Waters had taken over a half interest in any loss or gain in the winter

(Testimony of Julius Krakauer.)

book, and as soon as he came here [155] and saw Mr. Waters and collected from him his share of the loss he would repay me.

Q. And he repaid you when?

A. Not all at one time.

Q. When was the last repayment made to you—in which calendar year, 1941, 1942, or 1943?

A. That debt of his to me varied. In fact, the \$5,000 that appears as my savings was there, because for seven months before I left his employ I began to—well, refuse, I might say, to loan him any further money. It was that \$5,000 that I kept letting Julius have off and on out of my savings account. He would pay me, and if he wanted it again, I would take it out of the savings. [156]

Q. At least, up until the middle of the year of 1943, at least to July, Julius would come to you periodically in 1941, '42 and '43 and borrow money.

A. Not in 1943.

Q. In 1942? A. Yes.

Q. In 1941? A. Yes.

Q. Periodically, then, he would come to you and ask you for money? A. Yes.

Q. And you would be able to help him out?

A. Up to the \$5,000, but I doubt if he ever owed me that much, as much as \$5,000.

Q. And Julius would tell you at that time that he was broke, wouldn't he?

Mr. Campbell: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

(Testimony of Julius Krakauer.)

Mr. Belli: Q. Despite the mirth, you may answer. A. What is that?

Q. Despite the seeming mirth to you, will you please answer the question?

Mr. Campbell: I ask that statement of counsel be stricken from the record. [157]

The Court: Counsel, I see no reason for gratuitous statements on your part. I feel I am allowing you considerable latitude in this examination. Now, proceed.

Mr. Belli: I am sorry, Your Honor. I withdraw that.

Q. Would you answer the question, please.

The Witness: May I have the question, please?

(Question read.)

A. I would presume if he borrowed the money that he would be needing it. But if he was entirely broke, I would not undertake to say.

Q. You didn't take any cards out of this set when you gave them to the Government, did you?

A. I never gave them to the Government. They were summoned by the Government—under summons.

Q. Didn't you go up to the Government first? We don't want to go through all that again, but didn't you go up to the Government first?

A. No, sir, I did not.

Q. Well, they didn't come to you first?

A. Yes, sir, they did.

Q. I understood yesterday that you were the man that went to the Government with respect to these cards.

(Testimony of Julius Krakauer.)

A. I am sorry, I told you I would get you the necessary information. Here are two summons I received from the Government.

Q. Do you know how the Government knew you had these cards? [158] A. Pardon me?

Q. Do you know how the Government knew you had these cards?

A. They didn't know until Feckheimer came to my room with that first summons on February 5; he had phoned me and said he wanted to see me and I told him the job I had, working in the produce district, and part time with C. H. Brown at my old job as hardware man, that it was difficult for me to see him during the working hours, and he kindly consented to come to my room with the statements and asked me if I had any books or records and if I had those cards and I gave them to Mr. Feckheimer.

Mr. Campbell: May the record show the witness has handed to counsel——

Mr. Belli: Counsel, you don't have to let the record show anything. I am going to introduce them.

Mr. Campbell: I will stipulate, then, that they may be received in evidence.

Mr. Belli: Q. This is the 16th of February, 1945? A. Yes.

Q. A summons to appear and produce books and so forth? A. Yes.

Mr. Belli: May we have these received in evidence as Defendant's exhibit next in order.

(Testimony of Julius Krakauer.)

The Court: So ordered. [159]

(Summons to Julius Krakauer was there-upon received in evidence and marked Defendant's Exhibit D.)

Mr. Belli: I may be in error. It was yesterday, and I may have forgotten it overnight, Mr. Krakauer, but I understood you went within a very short time after leaving Mr. Wild's employ to someone in the Government with these cards. We are in error on that, right?

A. If I left that impression, it was certainly wrong because I did not so state or intend to so state.

Q. As a matter of fact, you did not see the Government about these cards until way in 1945.

A. Mr. Peckheimer came to my room at my request because I could not see him during business hours and he examined me there in my room, No. 414 at 835 O'Farrell.

Q. And you had the cards in your room at the time?

A. I did, sir, and they were all there at the time.

Q. You were going to look up some memorandum that you had in writing regarding that transaction you told us about.

A. I was very sure I had those, Mr. Belli, but you were pressing me for an exact date and I knew I had those summons and I didn't care to answer, when I felt sure I had that information which I could bring you this morning.

(Testimony of Julius Krakauer.)

Q. Well, Mr. Krakauer, this is not in your handwriting? A. No, sir.

Q. Where is the one that is in your handwriting? [160]

Mr. Campbell: Just a minute. I object as assuming a fact not in evidence. He did not say a memorandum was in his hands.

The Court: Sustained.

Mr. Belli: Q. Didn't you have a memorandum in your handwriting?

A. No, I didn't say that.

Q. This is February 16, 1945, this is what you had reference to? A. Yes.

Q. And you left Mr. Wild, as you say, in September of what, 1943?

A. Yes, September 1943.

Q. This, by the way, is the memorandum that you prepared for Mr. Wild to sign, is it not? Isn't that the memorandum you prepared for Mr. Wild or his agents to sign, Mr. Krakauer? (Showing document to witness.)

A. I don't think I prepared this, Mr. Belli. Now, I may be mistaken as to that, but I had no recollection of preparing it. I don't think I did. I wouldn't say positively, though.

Mr. Campbell: May the document be marked for identification?

The Court: So ordered.

Mr. Belli: Q. You have never seen this before?

A. I tell you I might have, but I really don't think so. I [161] wouldn't say positively one way

(Testimony of Julius Krakauer.)

or the other. I don't think I prepared it. I would have prepared it on my own typewriter and that is not my typing.

Q. Certainly you would have a recollection about the events.

A. I don't think I prepared it, sir. I don't recollect it. I am sure of that.

Mr. Belli: We offer this as our next exhibit for identification.

The Court: So ordered.

(Memorandum in question was thereupon marked Defendant's Exhibit E.)

Mr. Belli: Q. If I were to show you the United Airlines ticket invoices for 1941 and 1942, giving the dates that Mr. Wild was out of town, would that refresh your memory as to the number of times that he was out of town on business?

A. Yes, naturally, because I knew he flew down there.

Q. You also knew that he bet quite heavily when he was down there, didn't you?

Mr. Campbell: Objected to as calling for the conclusion of the witness.

The Court: Sustained.

Mr. Belli: Q. Well, do you know that?

Mr. Campbell: Now, just a minute. Unless it is established that the witness was present, he could have no knowledge other than by hearsay. I object to the question. [162]

The Court: Well, go ahead.

Mr. Belli: Q. Did you hear that directly from Julius when he returned?

(Testimony of Julius Krakauer.)

Mr. Campbell: I make the objection that is incompetent and it is a self-serving declaration.

The Court: Objection overruled.

The Witness: What is the question?

Mr. Belli: Q. Did you hear that directly from Julius when he returned from the South or these other tracks that he had bet and lost?

A. Sometimes he told me; sometimes I heard it in the room, such rumors and talk one hears in any establishment.

Q. Don't you know, as vernacular goes, he was "making book" when he would go down there?

A. Yes, I knew that. At least he told me that; I didn't see that.

Q. Those business transactions did not appear on these cards, did they?

A. No, they did not.

Q. By the way, did any of this transportation expense appear on these cards? A. No, sir.

Q. Here is 12 times in 1941 and 22 times in 1942.

Mr. Campbell: Now, just a minute. I object to that statement of counsel. That does not appear on the document he [163] refers to.

Mr. Belli: Well, my question should be more properly to you, Mr. Krakauer. I will withdraw my remark: It is gratuitous and I should not have made it.

Q. Mr. Krakauer, if you look at that sheet that will indicate the number of fare trips—22, I counted them. You don't have to take my word. You can count them, 22 here and 12 here.

(Testimony of Julius Krakauer.)

Mr. Campbell: Again, I object to the characterization of the document. I submit it to the Court.

Mr. Belli: Let me introduce the document not presently, but later. Based on those figures, does that jog your memory as to the number of times Julius was out of the business here in 1941 and 1942? A. He would only go over Sunday.

Q. Over the weekend?

A. Over the weekend, and come back usually Monday, is my recollection. I wouldn't say definitely Monday every week. But he did not operate Sunday.

Q. Bob Hughes would go down with him, wouldn't he?

A. No, not unless it was times I didn't know about. But it was not a custom. It was not a custom.

Q. Did Mr. Hughes help Julius on the bets that were made outside of the room, that is, the bets that had been phoned in, or the so-called runners that would come in from the various clubs? [164]

A. Only to the extent of submitting them to him whether or not he would accept them.

Q. You didn't have anything to do with those checks?

A. No, sir, except as they came to my station and offered them, and they were in excess amount, I would ask if they were acceptable or not which was a rule, of course, naturally.

Q. But isn't it fair to say that 90 per cent of those bets went directly into Julius and did not come through you?

(Testimony of Julius Krakauer.)

A. The ones over the phone probably did, but there were comparatively few of those, I believe.

Q. You say there were comparatively few of those. How about in size, weren't those the big bets, the \$100 and \$200 bets, or do you know?

A. I wouldn't want to say definitely. Mr. Wild had some bettors that he gave phone privileges to. I should not like to mention their names.

Q. You are not being asked to mention names, sir.

A. O.K.

Mr. Belli: That is all of this witness, Your Honor.

The Court: Any redirect examination, Mr. Campbell?

Mr. Campbell: Yes, Your Honor.

Mr. Belli: May we mark this and by "this" I refer to United Airlines letter with list of trips?

Mr. Campbell: And I made the objection, Your Honor, that no proper foundation has been laid for the admission of the [165] document in evidence.

The Court: It may be marked solely for identification.

(United Airlines letter in question was thereupon marked Defendant's Exhibit F for identification.)

Redirect Examination

Mr. Campbell: Q. Mr. Krakauer, during cross examination counsel asked you in effect what knowledge you may have had concerning losses of Mr. Wild in bets at the track and showed you certain

(Testimony of Julius Krakauer.)

cards which were marked Defendant's Exhibit B for identification. He referred to various amounts on them. Will you examine these, and particularly the dates on those cards and state in what year, or to what year those bets were made according to the card? I am referring, for the purpose of the record, to Defendant's Exhibit B for identification.

A. They were all made—let me look at the last three. The others were all 1944. I don't know how they mark these down here in Mexico. But this batch is 1944.

Q. In the first group you examined, the dates are all December 1944, is that correct, sir?

A. Yes, but these—I don't know how they mark these.

Q. The first group are all Hollywood Park pari-mutuel tickets.

A. I will have to look at those.

Q. The date here, and I call your attention to this, that the years here involved are 1941, '42 and '43.

A. Hollywood Park? [166]

Q. Yes, and all in December of 1944.

A. Yes.

Mr. Campbell: I do not know how they mark these down here.

Q. There are in the group three tickets which appear to be Hippodrome de Tijuana, the Mexican track, and no dates appear on those three.

A. That's right.

Q. The dates which appear here, December 1944, were all a year after you had left Mr. Wild's employ, is that correct?

(Testimony of Julius Krakauer.)

A. Yes, just a year and some months.

Q. Now, Mr. Krakauer, did you ever steal, purloin or take from Mr. Wild one cent other than the salary which you received in your employment there?

Mr. Belli: That question is objected to as leading and suggestive.

The Court: You might add to the "one cent," or "any other sum or sums."

Mr. Campbell: Yes, any other sum or sums.

The Court: The objection is overruled.

The Witness: A. Absolutely not—not one penny.

Mr. Campbell: Q. Did you ever receive or take any of the money referred to as sleeper bets here?

A. Absolutely not one penny.

Q. You stated, I believe, with respect to these cards that the [167] cash was balanced nightly, is that correct, sir?

A. I had to take it to the bank and account for it, so I balanced it every night, sir.

Q. And that amount of money had to be on hand or was on hand at the beginning of the following day's business.

A. Yes, sir.

Q. And that was always correct to the cent, the amount on hand, as shown by the cards?

A. If it was not, there was some explanation necessary, and as far as I know, that was always true.

Q. Now, counsel has questioned you concerning loans made to Mr. Wild and some phone calls from

(Testimony of Julius Krakauer.)

Santa Anita, I believe, wherein he requested you to take care of certain obligations, is that correct?

A. Yes.

Q. In what year did that occur, Mr. Krakauer?

A. 1940.

Q. Counsel asked you something to the effect that if Wild told you at that time that he was cleaned out—what was said in that regard?

A. He did not say that. He wanted money to take care of the bets that would be presented before he could possibly return to his room, that the bets he had taken in his winter book, because he didn't want anybody to wait.

Q. And you say you advanced about \$5,000 at that time in 1940? [168]

A. Oh, around \$7,000. I wouldn't want to say the exact sum.

Q. That sum was repaid to you during 1941 and 1942?

A. Well, in fact, immediately upon his return and his receiving some monies from Mr. Waters, at least he said he got them from Mr. Waters, he paid me a considerable part of it.

Q. That was still in the year 1940?

A. That was still in the year 1940.

Q. Let us go back a bit. You have been questioned here as to the assets which you had when you came to California in 1932, and you referred to accumulation of the money which you have, and testified as to certain assets which you had disposed of. Did you have those assets at the time you went

(Testimony of Julius Krakauer.)

to work for Mr. Wild, that is to say, the irrigation pool interest?

A. All except the one that I had sold previously.

Q. What was that?

A. That was my library, because it was deteriorating and Mrs. Sullivan, a very good friend of mine, wrote me that I better dispose of it.

Q. You say your initial \$500 was advanced in around 1932, was it, or what year was it that you made the initial advance, as near as you recall?

A. I think it was nearer 1934 because it was when Mr. Wild was in Canada. I can identify it only in that way.

Q. When did you come to California?

A. In 1932. [169]

Q. Were you employed from that time until you went to work for Mr. Wild in 1936?

A. I always managed—times were tough. There was a depression——

Q. Were you employed then?

A. I was always able to find a little something to do. Part time bookkeeping was one of the things I could do, and I would do work at nights—anything to get ahead.

Q. You were continuously employed?

A. Yes, I was—sometimes part time; but always so I could eat.

Q. You didn't have any dependents, or did you have any dependents in 1932?—and up through the period you worked for Mr. Wild?

A. I have two boys, but fortunately they have not ever been dependent on me.

(Testimony of Julius Krakauer.)

Q. They are grown sons?

A. They are grown sons and one is still in the Army.

Q. Were you supporting anybody for the period you were working with Mr. Wild? A. No.

Q. What was your standard of living?

A. Very simple. I neither drink nor smoke. My tastes are not extravagant and I do a little entertaining. If friends come to town, I take them to dinner. My only extravagance, perhaps, is music and opera and reading, but that I get from the library. [170] So I live, not frugally, but comfortably, and I have been in the hotel where I presently reside for nine years. It has been a home to me.

Q. Have you consistently saved throughout your mature life?

A. When I came here I had to. I was getting along in years. I will be 69 next week.

Q. During the time you have been in California, have you consistently saved money?

A. I always have, because I had to.

Q. Did you continue to save money throughout the period of time you worked for Mr. Wild?

A. Yes, sir.

Q. You were receiving, as I understood your answer to Mr. Belli's questions, some income other than from Mr. Wild by way of dividends, is that correct? A. Yes.

Q. Did you also receive interest during that period?

(Testimony of Julius Krakauer.)

A. From Mr. Wild on the loans I made him.

Q. What would those sums go into, your savings?

A. Well, yes, they went into my commercial and then into savings—the \$5,000 did.

Q. I mean, did you save that money?

A. I saved that money. In fact, I saved most of what I made except what I needed for living expenses or entertainment when my friends from Texas came. [171]

Q. How much would your living expenses run to, approximately? Put it on any basis you can estimate it, daily, weekly, monthly, or annually.

A. In those days things were cheaper. I should say I lived probably on a dollar a day.

Q. Would that include your rent?

A. Yes, my rent was very reasonable.

Q. What was the rent you were paying?

A. \$23.50 a month for a room and bath.

Q. When you say a dollar a day, does that include rent?

A. No, let us say a dollar and a half a day.

Q. What were your expenses during the period here in question, 1941, '42 and '43? What would they average?

A. Maybe \$100 a month. I don't believe they would run that high.

Q. Was that your entire living cost, \$100 a month during the period in question?

A. I believe that would cover it. That is pretty hard to say.

(Testimony of Julius Krakauer.)

Q. I understand——

A. But I think that is fairly stated. I don't want to get too definite.

Q. Now, what was your rate of compensation during the period you worked for Mr. Wild?

A. Well, I should say, taking——

Q. No, give us the amount. What did you start at per day? [172]

A. \$6.00, I believe.

Q. How long did that continue? When did you get a raise?

A. Maybe a year or a year and a half.

Q. That would be in 1937 or '38? A. Yes.

Q. What did the compensation then become?

A. \$8.00—\$6.00—no, \$8.00, I should say.

Q. Were you subsequently raised to \$10?

A. Yes, but that was only during the last two years. I wouldn't want to be too definite on that year, sir.

Q. Were those wages based on a six-day week?

A. Yes.

Q. Something was said about bonus. In addition to the daily rate, did you also receive a bonus from Mr. Wild?

A. Yes, on any single day winning over \$100 you got a bonus.

Q. How much bonus did you get?

A. \$1 or \$2.

Q. Per day? A. Yes.

Q. When that ran over that amount?

A. Yes.

(Testimony of Julius Krakauer.)

Q. How often would that occur, if you recall?

A. I wouldn't want to say, because——

Q. Was that a frequent occurrence?

A. It was fairly frequent. [173]

Q. Let us go back a moment, Mr. Krakauer: As I understood your testimony, while you were still working, some investigation was begun by some Internal Revenue agent, is that correct, sir?

A. Yes, sir.

Q. What year was that?

A. Early part of 1943.

Q. That is while you were still employed there?

A. Yes, sir.

Q. While you were still maintaining these cards?

A. Yes, sir.

Q. And that investigation, at least the time you were there, was concerned with the year 1941, is that correct, sir?

A. Yes, sir.

Q. During the period of time that you were still employed there, did you have any communication or conversation with any Internal Revenue agent?

A. I did not.

Q. Was the first conversation that you had with an Internal Revenue agent the time when they took these cards from the room?

A. Mr. Feckheimer was the agent.

Q. All right. As to this bonus that was paid to employees, when the take or profit would run over \$100, was that included in the expenses shown on these cards? [174]

A. That's right.

(Testimony of Julius Krakauer.)

Q. So that is not in addition to the expenses set forth here? A. No.

Q. So I understand the testimony——

A. (Interrupting): Mr. Campbell, may I correct that to this extent?

Q. Yes.

A. Sometimes Jules would pay that out of his own pocket and it would not appear on the card. I want to be fair and honest about this.

Q. Well, as these cards stand now, and as they were made up at the end of the week, were such bonuses as he paid out of his pocket taken in here?

A. Not all of them.

Q. Well, how often were they not taken in here?

A. That would be hard to say, but I couldn't say positively that they were all on there. That would not be true.

Q. Well, can you give us your best recollection as to how often that occurred when they were taken in on the cards?

A. Maybe 50 per cent of the time.

Q. Who received these bonuses, according to your best recollection?

A. Everybody in the room.

Q. Everybody in the room would receive an equal amount?

A. At one time not an equal amount; but later on, everybody [175] in the room got an equal amount.

Q. During '41, '42 and '43?

A. I think they all received an equal amount.

(Testimony of Julius Krakauer.)

That is awfully hard to answer, too, but I think they all received the same amount.

Q. How much was received by each individual? How much did you get?

A. Anywhere from a dollar to two dollars.

Q. Anywhere from a dollar to two dollars?

A. Yes.

Q. Never over two dollars?

A. It might have run over two dollars sometimes.

Q. Well, do you recall it ever running over two dollars? A. Yes, I do.

Q. On how many occasions?

A. Not a great many, but we also, of course, had the holiday little distributions and things of that kind that occur in every establishment.

Q. I am referring to the bonus payments.

A. I don't think——

Q. How often can you state during the years 1941, '42 and '43 were those omitted from the cards?

A. Perhaps 50 per cent of the time. That is difficult to say because, as I say, Jules would sometimes decide if it was not quite the \$100 he would pass it out anyway. He was generous [176] in that regard.

Q. And that would only take place where the profit for the day would exceed \$100, is that correct? A. Yes.

Mr. Campbell: That's all.

(Testimony of Julius Krakauer.)

Recross Examination

Mr. Belli: Q. Mr. Krakauer, what interest was Julius charged by you? A. What is that?

Q. What interest did you charge your good friend Julius?

A. I think Jules will confirm this, that every now and then he handed me some money and there was no stipulated interest, and very often I did not even have a note for the loan, and he would pass me out some money and say, "This is on interest account." It was not stipulated. It was simply an arrangement between friends.

Q. The interest didn't appear on these cards there? A. No, it did not.

Q. With reference to these activities of yours that you mentioned that you had no vice, you did not smoke or drink, but you did go to the library during the time you were living so frugally——

A. I always have carried a library card since I came here.

Q. You lived on about a dollar and a half a day?

A. I think that is about right. [177]

Q. How were you on the races? Did you make any money?

A. No, not a great deal. If I lost, it was not a great deal, or if I won it was not a great deal. It is pretty hard to win at the races. But I did not lose much.

Q. How often did you bet?

A. If I had a plan or system that was going and

(Testimony of Julius Krakauer.)

if a horse did not appear that day, I had will power enough to resist and I did not bet.

Q. How often would you bet—two or three times a week?

A. Possibly, sometimes every day, if this fitted into my plan, but a very small amount.

Q. And apparently you were one of those individuals who broke even on the races?

A. I would say so.

Q. Wouldn't you say in that regard you were more fortunate than your employer, Julius?

Mr. Campbell: That is objected to as calling for the conclusion and opinion of the witness and argumentative.

The Court: Sustained.

Mr. Belli: Q. You know, as a matter of common knowledge, that Julius didn't break even on his betting, don't you?

Mr. Campbell: Objected to as incompetent.

The Court: Sustained.

Mr. Belli: May I try once more this way, and will you withhold your answer until we find out if it is permissible for [178] you to answer the question:

Q. Do you know of your own knowledge if Jules was successful in betting on his own account?

A. He was not successful.

Q. That is true? A. That is true.

Q. So it is true that you were more successful on the number of wins you had than your employer.

Mr. Campbell: That is objected to as a conclusion.

(Testimony of Julius Krakauer.)

The Court: Sustained.

Mr. Belli: That's all. Thank you very much.

Redirect Examination

Mr. Campbell: Q. You say of your own knowledge—were you present at the tracks when Julius would bet? A. No, I was not.

Mr. Belli: I object to that as cross examination of his own witness.

The Court: Objection overruled.

The Witness: I was not.

Mr. Campbell: Q. Were you present with Julius when he placed bets at the track?

A. No, sir.

Q. Were you present with Julius when he collected on any bet that he may have won?

A. No, sir, except when he made them in the room when his [179] horses ran. I knew the bets he made on his own horses, his own stable.

Q. When you say of your own knowledge he was not successful in his betting, are you referring then to the number of bets which he made in the room itself? A. Mostly.

Q. You are not referring to bets he may have made at the track?

A. No, sir, I didn't know about it.

Mr. Campbell: That's all.

Mr. Belli: That's all.

The Court: One question:

Q. During the years 1941, 1942 and 1943, as I understand your testimony you kept the immediate accounts in the establishment?

(Testimony of Julius Krakauer.)

A. That's correct, sir.

Q. As exemplified in those tickets?

A. That's correct.

Q. And that formula, as set forth therein, of accounting is one which is more or less uniform in establishments?

A. I don't know, sir; I just devised it myself.

Q. In other words, you created that pattern of account? A. Yes.

Q. To your knowledge, did the defendant have any person or firm or individual other than you who kept his personal accounts during that period of time? A. Not to my personal knowledge.

Q. Did he ever indicate to you that he desired you to keep his personal accounts or maintain them if he had any?

A. No, I didn't keep his personal accounts.

Q. Well, to your knowledge, did he have any person who aided or assisted him in keeping or maintaining his personal accounts?

A. Not to my knowledge.

Q. So, to your knowledge, he had only one account as set forth in the tickets?

A. That's correct, to my personal knowledge, that is.

The Court: All right.

Mr. Belli: May I ask a question or two, Your Honor?

The Court: Yes.

(Testimony of Julius Krakauer.)

Re-Cross-Examination

Mr. Belli: Q. Mr. Krakauer, did you ever ask him to give you an accounting of any of these expenses like the United Air Lines expense or traveling expenses or his betting expenses so you could include those in the cards?

A. I never did ask him.

Q. As a matter of fact, speaking of Julius, the way he ran the business on money matters and on his accounting, you would characterize that as very sloppy, wouldn't you?

Mr. Campbell: That's objected to, Your Honor.

The Court: Sustained. [181]

Mr. Belli: Q. Was he careful about his accounting of money matters?

Mr. Campbell: That's objected to as calling for the conclusion of this witness.

The Court: Sustained.

Mr. Belli: How did he keep his money matters, personal accounts, do you know?

Mr. Campbell: We object to that, Your Honor, he already stated that he did not know.

The Court: All right, he can answer the question again.

The Witness: I didn't know how he kept that. A good deal of money was kept on his person, I know that.

Mr. Belli: Q. Was it necessary for him to keep a good deal of money on his person to pay off debts? Isn't that one of the accoutrements of a book maker to have large sums of money on his person.

(Testimony of Julius Krakauer.)

A. No, not necessarily. But in those days even I always kept a few hundred dollars to help out.

Q. Why?

A. Because very often he would bet on those cinches, and sometimes I would have to have the cash available to build up, or carry on for him, and I gave him a complete accounting of it, and the cards which show it, so I was protected when he would come back.

Q. And when he came back from those cinches, there was no [182] accounting of what money he had spent or had in his pocket, was there?

A. No, I wouldn't know that.

Mr. Belli: That is all.

Redirect Examination

Mr. Campbell: Q. You say he carried considerable sums of money on his person. Did you ever have occasion to ascertain how much he carried on his person? A. I did, sir.

Q. When was that?

A. On an occasion——

Q. What year?

A. Probably 1922. I went into the washroom in the establishment just before closing things up, which I usually did, and on the ledge I found his wallet and I picked it up and he usually had lunch or dinner in the Dixie Dixon next door, and I counted the money and there was \$2200 and I went in and he was sitting there with some friends having some coffee and I said, "Jules, are you missing anything?" He immediately slapped his thigh, and

(Testimony of Julius Krakauer.)

he said, 'My wallet!' I said, 'Here it is.' I said, 'Before I give it to you, Jules, how much money is in there,' because I wanted to protect myself and I didn't want any responsibility if any was missing. He said, '\$2100 or \$2200.' I said, 'There is \$2200, yes.' And gave him the wallet, and he always—— [183]

Mr. Campbell: I don't want any heresay, Mr. Krakauer. That is all.

Recross Examination

Mr. Belli: Q. You asked him how much money was in the wallet before you gave it to him?

A. Yes.

Q. And you counted it before you left the washroom?

A. I counted it before I left the washroom and checked with him so he would not get the figure up. Not that I distrusted him, but I found the man's wallet and I was justified in asking him how much money was in there, because somebody else might have filched it, or there might have been 2000 there. But he told me there was \$2100 or \$2200.

Mr. Belli: That is all. Thank you.

Mr. Campbell: That is all.

The Court: Ladies and gentlemen of the jury, you now retire for the morning recess. Again I admonish you not to discuss this case among yourselves nor suffer any person to converse with you on any subject of the trial, and not to form or

(Testimony of Julius Krakauer.)

express any opinion thereon until the case is finally submitted to you.

(Recess.) [184]

The Court: You may proceed.

Mr. Campbell: Mr. Lippert.

CHESTER J. LIPPERT,

called for the Government; sworn.

The Clerk: Q. Will you state your full name, sir? A. Chester J. Lippert.

Direct Examination

Mr. Campbell: Q. What is your business or occupation, Mr. Lippert?

A. I am an Internal Revenue agent.

Q. Attached to the Agent in Charge for this District, in San Francisco?

A. That's right, sir.

Q. And how long have you been a revenue agent? A. Six years.

Q. And as a revenue agent, is it one of your duties to examine and audit returns filed by individual taxpayers, corporations, partnerships, firms, together with substantiating books and records for the purpose of verifying the amounts returned for taxes? A. It is.

Q. Calling your attention first to Government's Exhibit 1, the return of Julius Wild for the calendar year 1941 (handing document to the witness), I will ask you if, in connection [185] with your official duties as a revenue agent you had occasion

(Testimony of Chester J. Lippert.)

to examine that return for the purpose of verification? A. Yes, I did.

Q. Will you state when you were given that assignment, Mr. Lippert?

A. I had the case, and I wrote a letter to the taxpayer asking him to bring in his books and records, on January 23, 1943.

Q. January 23, 1943? A. 1943, yes.

Q. By "The Taxpayer," do you refer to Julius Wild? A. That's right.

Q. Now, subsequently, did the taxpayer or his representative appear at your office?

A. Yes, sir.

Q. And who appeared there?

A. A Mr. Callahan.

Q. Do you recall his first name?

A. No, I don't.

Q. Was that a R. F. Callahan?

A. He was the taxpayer's representative.

Q. I see. Was a power to represent presented at that time? A. Yes, sir.

Q. All right. Now, on the occasion of your first meeting with Mr. Callahan were any books or records presented in substantiation [186] of the 1941 return?

A. There were a few books and records presented, but they were inadequate, and I asked him to bring in further books and records.

Q. Do you recall what he brought on the first occasion?

A. Just some papers in connection with his deductions.

(Testimony of Chester J. Lippert.)

Q. Do you recall what they were at this time?

A. No, I don't.

Q. Were they left with you? A. No.

Q. As I understand you, you called for further records, is that correct? A. That's right.

Q. Now, was there a second meeting with Mr. Callahan, or with Mr. Callahan and Mr. Wild?

A. Yes, sir.

Q. With whom? A. With Mr. Callahan.

Q. And do you recall when that was?

A. Just a few days after the first meeting.

Q. That would be the early part of 1943?

A. That's right.

Q. And was anything which purported to be records submitted to you on that occasion?

A. Yes. [187]

Q. What did they consist of?

A. Well, some cards, purported to be his income, and other records in support of his deductions on traveling expense.

Q. Now, referring to these cards, were the records left with you on that occasion, or examined and taken away.

A. No; they were examined and taken away.

Q. Taken away by Mr. Callahan, is that correct? A. That's right.

Q. Do you recall how many cards there were?

A. I believe there was a card for each month.

Q. You were only examining with reference to 1941? A. That's right.

Q. So that there were 12 cards presented to you, as you recall them? A. Yes.

(Testimony of Chester J. Lippert.)

Q. Do you recall what those cards showed or purported to show?

A. Well, his income for the year 1941.

Q. Well, what was the nature of the figures set forth on those cards, if you recall? Was there a single item, or more than one item?

A. Oh, there was more than one item.

Q. Do you recall what they purported to be?

A. Well, just representing his gross take from the—

Q. Gross take. Were expenses also set up there?

A. I don't recall. [188]

Q. I see. Would you recognize those cards if you saw them again?

A. I believe I would, yes.

Q. You do recall definitely that there were 12 cards, one for each month? A. Yes.

Q. And did you compare those cards with the return filed by Mr. Wild for the calendar year 1941—that is to say, the figures contained on his 1941 return? A. Yes, I did.

Q. And did they purport, or did they support the figures set forth on this 1941 return (handing document to the witness)? A. They did.

Q. I am going to show you Government's Exhibit 7, which purports to be some 44, I believe, cards—52 less 8—some 44 cards (handing cards to the witness). And I will ask you if those were the cards that were submitted to you? You will observe that there is writing both on the front and on the back, and that they purport to be weekly cards. A. Yes, I think I recall those cards.

(Testimony of Chester J. Lippert.)

Q. Were those cards submitted to you?

A. Yes.

Q. Well, then, it is your testimony that some 44 cards were submitted to you, rather than one for each month? A. Some 44 cards? [189]

Q. Yes. You stated that some 12 cards were given to you to substantiate the return.

A. Yes.

Q. I am asking you if these were the cards, which comprise some 44 cards. If you will look at them. Those were submitted to you by Mr. Callahan, were they?

Mr. Belli: I think, counsel, hasn't he already answered? But if there is some confusion, as there apparently is, I have no objection if you lead him. If he is confused on it, I don't have any objection to that. I don't think he understands.

Mr. Campbell: Q. Have you ever seen these particular cards, Mr. Lippert? As I understood you, some 12 cards, one for each month, were handed to you. These purport to be cards for each week of 1941.

A. I believe that the cards submitted to me were the 12 monthly cards, not these cards.

Q. They were not these cards? A. No.

Q. And you do recall definitely, however, that when you checked the cards that were handed to you, that they substantiated the figures set forth in the 1941 return, is that right?

A. Yes, that's right.

Q. And they substantiated, did they, such figures, or did you [190] add them to see whether

(Testimony of Chester J. Lippert.)

they substantiated the figures of total receipts, \$19,-758? A. Yes, I added the cards up.

Q. And they did substantiate that amount?

A. They did substantiate the figures, yes, sir.

Q. And did you, on that occasion—strike that.

After your completion of the examination of the cards, have you had anything further to do with this case? A. No, nothing at all.

Q. And have you, from that day to this, seen the 12 cards which were submitted to you?

A. No, I have not.

Q. You are definite, now, that these cards were not the cards that were submitted to you?

A. That's right, I am.

Mr. Campbell: You may cross examine.

Cross Examination

Mr. Belli: Q. Did Mr. Callahan say the cards were made up by a Mr. Krakauer?

A. He didn't say.

Q. You knew Mr. Krakauer about this time, didn't you? A. I didn't know Mr. Krakauer.

Q. When did you first meet Mr. Krakauer?

A. I didn't meet Mr. Krakauer.

Q. You have never met him? [191]

A. Never met him.

Q. When the cards were brought to you, these 12 cards, was any explanation made with reference to expenses coming out of the business, or airplane travel, and all the rest of that?

A. Yes. I was questioning him in regards to his traveling expenses in connection with these trips to Caliente.

(Testimony of Chester J. Lippert.)

Q. Yes. And were any vouchers submitted to you to support his contention that he had been to Caliente, had some expense in connection with that?

A. No, not that I can recall. As my report shows, I disallowed some traveling expenses as being unsubstantiated.

Q. Then some of these expenses that weren't substantiated, they then paid a tax on that, did they? A. Yes, they did.

Q. On \$83.00, or something like that?

A. That's right.

Mr. Campbell: I will stipulate to \$83.00—fifty-three—\$83.53.

Mr. Belli: Thank you.

That is all.

Mr. Campbell: That is all, Mr. Lippert.

(Witness excused.)

Mr. Campbell: Mr. Burkett.

WILLIAM A. BURKETT, [192]

called for the Government; sworn.

The Clerk: Q. Will you state your full name, sir? A. William A. Burkett.

Direct Examination

Mr. Campbell: Q. What is your business or occupation, Mr. Burkett?

A. Special Agent, Intelligence Unit, United States Treasury.

Q. And are you attached to the office of the Intelligence Unit here in San Francisco?

(Testimony of William A. Burkett.)

A. Yes, sir.

Q. How long have you been a special agent?

A. During the past three years, sir.

Q. As a special agent, it is your duty to investigate cases where there have been allegations of improper returns filed on behalf of taxpayers?

A. Yes.

Q. And were you assigned to this particular case, that is, the investigation of Julius Wild?

A. Yes.

Q. When did you receive that assignment?

A. January 21, 1946.

Q. Now, Mr. Burkett, will you recount briefly your education and experience since leaving college?

A. I graduated in law. I have a public accounting certificate in the State of California as a licensed public accountant. [193]

I was regional investigation chief for the Pacific Coast area, law enforcement, prior to the war.

I volunteered—

Q. For what agency?

A. War Production Board.

Q. Yes.

A. I volunteered for the armed services and was a staff officer in the Intelligence Unit, United States Coast Guard.

I returned to my position as regional enforcement chief, and I was likewise, prior to going with the War Production Board as law enforcement chief, with the bank, in the accounting de-

(Testimony of William A. Burkett.)

partment. Likewise, I was in the general controller's of the Company Protective Service.

Q. You had further public accounting experience? A. Yes.

Q. You say you are a licensed public accountant? A. Yes, sir.

Q. And you said you had further public accounting experience? A. Yes, sir.

Q. With what firm?

A. I was assistant to the secretary-treasurer of the Poultry Producers of Central California.

Q. For what period of time?

A. For the year '45 to '46.

Q. Since that time you have been with the Intelligence Unit? [194] A. Yes, sir.

Q. Now, Mr. Burkett, in connection with your investigation of this case, have you examined Government's Exhibits 7, 8, and 9, which have been identified here as the record cards setting forth the receipts, expenses, and other disbursements of the business of this defendant, Julius Wild, of 1182 Market Street in this City (handing documents to the witness)? A. I have, sir.

Q. Your attention is directed to the fact that on each of these cards, which purport to be weekly cards, there is set forth the gross amount bet for the week by customers of the establishment. I will ask you if you have computed for each of the years in question the total amount monthly shown by those cards as having been bet by customers with the defendant in the defendant's place of business

(Testimony of William A. Burkett.)

—that is to say, Julius Wild's place of business?

A. I have.

Q. Will you state with regard to the year 1941 what your examination showed to be the gross receipts for the month of January?

A. January, the gross receipts received by Julius Wild's place of business was \$49,492.

Q. For February of 1941? A. \$45,783.

Q. Now, will you proceed and give the same information on each month?

A. March, \$41,897.50.

The place was closed during April and May.

Q. There are no cards for April and May?

A. That's right, sir.

Q. Will you proceed?

A. June, \$27,350.

July, \$41,547.50.

August, \$56,911.

September, \$42,425.50.

October, \$28,622.

November, \$33,364.50.

December, \$16,708.50.

Q. Now, what is the total amount as found for the year 1941, as bet by customers in this establishment?

A. For the ten months of 1941 the total bets placed by customers was \$386,101.50.

Q. Now, did you make a similar examination with respect to the amounts bet by customers in the year 1942 as reflected by Government's Exhibit 8, the records of the defendant?

(Testimony of William A. Burkett.)

A. Yes, sir.

Q. Will you state month by month the amount as shown by those records as having been received in bets from customers?

A. January, \$39,633.50. [196]

February, \$38,329.

March, \$44,182.

April, \$35,923.

May, \$64,795.50.

June, \$56,903.50.

July, \$58,331.50.

August, \$72,381.

September, \$70,550.

October, \$38,684.

November, \$28,260.

December, \$21,537.

Q. What was the total for the year 1942?

A. Total, \$569,493.50.

Q. Now, did you make a similar examination with respect to the gross amount of bets received from customers by the defendant as shown, as reflected in the cards, Government's Exhibit 9, for the months there reflected of 1943?

A. Yes, sir.

Q. Now, will you state that month by month?

A. January, \$38,781.50.

February, \$31,003.

March, \$64,478.

April, \$43,263.

May, \$76,048.

June, \$69,052. [197]

(Testimony of William A. Burkett.)

July, \$35,765.

August, \$81,718.

September, \$82,603.

Q. Now, is that the last card that was available?

A. Yes, sir; that would be for the nine months of 1943.

Q. And what is the total amount, as reflected in your computation, that was received for the nine months for which the records are available?

A. \$522,711.50.

Q. And have you computed the total of the 10 months of '41, the 12 months of '42, and the 9 months available as of 1943, as to total bets reflected by the records, Government's Exhibits 7, 8 and 9, by the defendant, for that 31-month period?

A. Yes, sir.

Q. And what is that total figure?

A. \$1,478,306.50.

Q. And have you prepared or caused to be prepared a schedule setting forth the figures to which you have just testified (handing document to the witness)?

A. Yes, sir.

Q. And is that the document which I hand you?

A. Yes, sir.

Q. And this reflects or sets forth the same figures which you have just testified to? [198]

A. Yes, sir.

Mr. Campbell: This will be offered in evidence.

Mr. Belli: No objection. That is a recapitulation?

Mr. Campbell: A recapitulation.

(Testimony of William A. Burkett.)

The Court: It may be marked appropriately Government's Exhibit next in order.

The Clerk: Government's Exhibit 12 in evidence.

(The recapitulation referred to was received in evidence and marked U. S. Exhibit No. 12.)

Mr. Campbell: Q. I further call your attention, Mr. Burkett, to the fact that each of these cards purports to set forth certain further information, namely, the amounts paid out to customers, the various expenses and drawings as set forth on these cards. Have you examined each of these cards, and for each of the years here in question, for the purpose of ascertaining the net amount of profit for each of the years and each of the periods set forth by those cards by the defendant?

A. I have, sir.

Q. And in making that computation, have you allowed all expenses of whatever nature that are set forth on those cards?

A. Yes, all expenses.

Q. So that the figures which you have are those which are reflected by the cards, without any alterations or audit of any kind by you, is that correct, sir? [199]

A. That's right, sir.

Q. Now, referring to the year 1941, and for each of the months set forth in cards in Government's Exhibit 7—that is to say the records in respect to 1941—will you state month by month the amount of net profit reflected by such cards

(Testimony of William A. Burkett.)

as having been received by the defendant from that horse bet business? A. January, \$1,474.

February, \$2,128.

March, \$2,773.

April and May there are no records.

June, \$941.

July, \$2,287.

August, \$1,273.

September, \$3,295.

October, \$793.

November, \$1,770.

December, \$198.

Q. And have you totalled the net profit as shown by those records as having been received from the business? A. Yes, sir.

Q. For the calendar year 1941?

A. Yes, sir.

Q. And what is the total?

A. For 1941 the net profit is \$16,932. [200]

Q. Now, have you computed similar figures month by month for the year 1942 as is reflected in Government's Exhibit 8, the records for that period? A. Yes, sir.

Q. And will you state the figures of net profit as reflected by Government's Exhibit 8, allowing all expenses claimed on those cards?

A. January, \$1,851.

February, \$4,298.

March, \$2,012.

April, \$621.

May, \$5,130.

June, \$3,997.

(Testimony of William A. Burkett.)

July, \$247.

August, \$3,160.

September, \$5,699.

October, \$2,192.

November, \$3,493.

December, \$1,501.

Q. And have you computed the total net profit for the calendar year 1942 as reflected by those cards? A. Yes, sir.

Q. That is, Government's Exhibit 8, What is that amount?

A. Total net profit for the year 1942 is \$34,001.

Q. Have you made similar computations of the net profit [201] reflected by the record cards, Government's Exhibit 9, for the calendar year 1943?

A. Yes, sir.

Q. And will you, month by month, enumerate the amount of net profit reflected by those accounts? A. January, \$3,531.

February, \$2,679.

March, \$4,137.

April, \$4,259.

May, \$5,522.

June, \$5,495.

July, \$1,426.

August, \$1,408.

September, \$2,196.

Q. There being no cards reflecting October, November and December of 1942, is that correct?

A. That's right, sir.

Q. And have you computed the total amount

(Testimony of William A. Burkett.)

of net profit as shown by the cards, Government's Exhibit 9, for the calendar year 1943?

A. I have, sir.

Q. And what is that amount?

A. The total net profit of the year 1942 is \$30,653.

Q. Now, Mr. Burkett, there has been testimony here relative to the payment of \$105 a month for alleged protection, and it [202] was testified that that payment is reflected in these cards, Government's Exhibits 7, 8 and 9, with respect to each month of operation. If the payment of such amount—strike that.

If such amount were, in fact, paid for each of the months of operation, namely, 1941, and for the ten months computed by you, for the sum of \$1,050, have you computed, then, what the total net profit of the defendant would have been for that year? A. Yes.

Q. What is the figure? A. \$17,982.

Q. And with respect to the year 1942, during which there was 12 months of operation, and the amount of \$105 per month, being the sum of \$1,260, have you computed the amount of net profit which the defendant would have had if such expense is disallowed? A. Yes.

Q. And what is that amount?

A. \$35,261.

Q. And have you made a similar computation with respect to 1943, for the nine months of which records are available? A. Yes, sir.

(Testimony of William A. Burkett.)

Q. And disallowing the payment of \$105 a month for such nine months, or a total of \$945, what is the amount you have [203] computed the net profit to have been? A. \$31,598.

Q. Now, the figures which you have just testified to relative to the net profit shown by these cards and the last computation, which affects a disallowance of the amount paid for alleged protection, is set forth in the schedule which you have, which I just handed you (handing document to the witness)? A. Yes, sir, that is correct.

Q. This was prepared by you, or under your direction? A. Yes, sir.

Mr. Campbell: This will be offered as Government's Exhibit next in order.

The Court: It may be marked in evidence.

The Clerk: Government's Exhibit 13.

(The schedule referred to was received in evidence and marked U. S. Exhibit No. 13.)

Mr. Campbell: You may cross examine.

Cross Examination

Mr. Belli: Q. Mr. Burkett, as I understand it, to summarize your testimony so we will all be clear, and I will, myself, too, with reference to the last sheet, that gives us a recap here that you went through all of these figures of Mr. Krakauer's, or whatever it was, on this card here, and you estimated that from these cards, that in 1941 Julius' [204] net profit should have been around \$16,000—\$16,932, instead of what was declared for him; in 1942 it should have been \$34,000, instead of what

(Testimony of William A. Burkett.)

was declared; and in 1943 it should have been \$30,000, instead of what was declared.

By the way, so we may make a record, do you have there what was declared in the three years? See what I mean?

A. I don't understand your question, Mr. Belli.

Q. What did Julius declare in 1941?

A. Well, you have the exhibit before you, sir.

Q. As profit. You take these, and I think you can do better than I can (handing documents to the witness).

Mr. Campbell: Possibly he could retain one copy and you could retain the other.

Mr. Belli: No, he can tell me on that.

Mr. Campbell: What is your question?

Is there a question?

Mr. Belli: Yes.

Q. In 1941 what did Julius declare as his net profit, or what was declared for him as net profit?

Mr. Campbell: Now, I object to the question in that form, because there are various reports included in the return. There is a net profit from business, and there are also other items of income.

Mr. Belli: Well, that is fair enough. I will withdraw that. We will approach it in another way.

Q. When you compute net profit, the only thing that you put in there, I think you said this, but I want to be clear about it, you didn't include anything or any deductions other than that which appeared on those cards, right, for '41, '42, and '43?

(Testimony of William A. Burkett.)

A. I subtracted the gross take and all the operating expenses, Mr. Wild's salary, which left the net take, that's right.

Q. In other words, you didn't go outside of these three cards that I hold in my hand to compare this last exhibit of the Government, right?

A. We gave him the benefit of the doubt of sleepers, and the expenses of the raids. We didn't include that. We gave him the benefit of it.

Q. Yes. But you didn't deduct anything other than that which appeared on those cards. You didn't have any other facts to work from, did you, when you computed your last exhibit here?

A. That's right.

Mr. Belli: That is all.

Mr. Campbell: Is that all?

Mr. Belli: Yes, that is all.

Mr. Campbell: That is all, Mr. Burkett.

(Witness excused.)

Mr. Campbell: May I suggest the noon recess at this time, your Honor, before calling the next witness? [206]

The Court: Ladies and gentlemen of the jury, we have reached the noon hour, and we will take the noon recess and resume further trial at two o'clock. The same admonition to you, not to discuss the case, nor to form or express any opinion thereon until it is finally submitted to you.

(Whereupon a recess was taken until 2:00 o'clock p.m.) [207]

Afternoon Session, Thursday, August 12, 1948

2:00

The Court: You may proceed, counsel.

HUBERT C. MYTINGER

called on behalf of the Government, sworn.

The Clerk: Q. Will you state your name to the Court and jury?

A. Hubert C. Mytinger.

Direct Examination

Mr. Campbell: Q. What is your business or occupation, Mr. Mytinger?

A. I am assigned the technical adviser, Office of Regional Counsel, Penal Division, Bureau of Internal Revenue.

Q. Treasury Department?

A. Treasury Department.

Q. How long has that been your occupation?

A. I was assigned in February of this year.

Q. Prior to that what was your position?

A. Internal Revenue agent.

Q. For how many years were you an Internal Revenue agent? A. About 12 years.

Q. You are also a licensed public accountant in the State of California? A. I am.

Q. Will you relate briefly the nature of your training and [208] experience prior to becoming an Internal Revenue agent?

A. Well, I was a public accountant and accountant for private commercial firms for approximately ten years prior to becoming an Internal Revenue agent.

Q. And you were an Internal Revenue agent for

(Testimony of Hubert C. Mytinger.)

what length of time? A. Since July 1, 1935.

Q. During the course of your experience, particularly as Internal Revenue agent, and more recently as technical adviser attached to the Penal Division, has it been among your duties to examine income tax returns filed by individuals, corporations, firms and partnerships? A. It has.

Q. Has it been a portion of your duties to compute taxes based upon certain alleged incomes, giving allowances to deductions and credits allowed by law and other exemptions? A. It has.

Q. And that has been your principal work, has it, for the past 12 or 13 years? A. It has.

Q. Now, Mr. Mytinger, I will ask you whether or not the Bureau of Internal Revenue has heretofore made a determination with respect to dividends paid calendar years 1941, '42 and '43 by the California Jockey Club and the Orpheum Building Company, both California corporations, as to the percentage of the [209] dividends paid by such corporations during such calendar years are taxable and what percentage are non-taxable?

A. It has.

Q. Will you state what that determination is or was?

A. With respect to the calendar year 1941, the Bureau has determined that the Orpheum Building Company dividends were 65.61 per cent taxable and the California Jockey Club dividends were 79.29 per cent taxable.

Q. When you say "taxable" does that mean taxable in the hands of the recipients?

(Testimony of Hubert C. Mytinger.)

A. Yes, and that refers to taxable, as dividends.

Q. Yes, taxable as dividends.

A. Yes. Now, with respect to 1942, the Bureau has determined the dividends of the Orpheum Building Company to have been 70.9 per cent taxable, and no dividends were paid by the California Jockey Club in that year.

With respect to the year 1943, the Bureau has determined the dividends paid by the Orpheum Building Company to have been 82.07 per cent taxable; and the dividends paid by the Jockey Club to have been fully taxable.

Q. For the benefit of the jury, when we refer to dividends received by a stock owner as being taxable or non-taxable, will you state briefly the basis and purpose of such determination?

A. Generally, if they are paid from the accumulated earnings of the paying corporation, they are considered taxable income. [210]

Q. But if they are paid from a sale of assets or liquidation of any of the assets of the corporation, in that event they are not taxable to the person receiving them, is that correct?

A. To the extent they may be repaid from recovery of capital, that would be true.

Q. That is the basis of the determination here?

A. That is true.

Q. So that a certain percentage of the dividends paid by those two corporations in the years you indicated would not be taxable to the stockholder receiving them in the amount you have designated?

(Testimony of Hubert C. Mytinger.)

A. Not unless the amount he received exceeded the cost of his stock.

Q. Now, Mr. Mytinger, I call your attention to Government Exhibits 1 to 6, inclusive, which are the individual income tax returns of Julius Wild and his wife Emma Wild, for the calendar years 1941, '42 and '43, there being an individual return for both the husband and wife for such years. Have you heretofore examined or seen these returns?

A. I have.

Q. Mr. Mytinger, assuming that during the calendar year 1941 Julius Wild was married but had no other dividends; assuming further that Julius Wild and his wife filed separate returns for the calendar year 1941, each claiming one half of the personal exemption allowed by law, namely, \$750, as shown by the Government [211] Exhibits 1 and 4 and that during the said year 1941, the community, that is, Julius Wild and his wife received dividends on stock owned by them in the Orpheum Building Company and the California Jockey Club in the total amount of \$3484.50, as set forth in the exhibits to which I have heretofore called your attention, of which amount of dividends the sum of \$655.54 was taxable income, computed upon the basis you have testified to as that proportion which is taxable; assuming further that the community received net income from the business of horse race booking of \$17,982, so that Wild and his wife received a total gross community income of \$20,637.54, of which Julius Wild's one half on a community basis was the sum of \$10,318.77; assuming further that Julius

(Testimony of Hubert C. Mytinger.)

Wild was entitled to what was the non-business deductions which he claimed on his 1941 individual income tax return, Government Exhibit No. 1, of \$1,181.00, so that his net income on community property basis for the calendar year 1941 was the sum of \$9,137.77; assuming further that he was entitled to the earned income credit set forth on his return, that is, \$339.90:

What would have been his total tax liability on his individual income tax return for the year 1941?

A. \$1,303.34.

Q. What was the amount which he reported as due from him for the calendar year 1941 on the income tax return filed by him for that year which is Government Exhibit No. 1? [212]

A. \$270.66.

Q. Will you compute the difference between those two amounts?

A. The difference is \$1,032.68.

Q. Mr. Mytinger, assuming that during the calendar year 1942 the defendant Julius Wild was married, but living separate from his wife, had no other dividends; assuming further that for such calendar year Julius Wild and his wife filed separate returns each claiming one half of the personal exemption allowed by law, that is, \$500, as set forth in Government Exhibits 2 and 5, respectively; assuming further that during the said calendar year the community, that is, Julius Wild and his wife, received dividends on stock owned by them in the **Orpheum Building Company**, a corporation, of \$1,119 as set forth in the returns to which I have

(Testimony of Hubert C. Mytinger.)

directed your attention, of which amount \$793.37 was taxable income upon the basis determined by the Bureau of Internal Revenue with respect to such corporation; assuming further that the community net income from the business of bookmaking on horses was the sum of \$35,261, or a total community income of \$36,064.37, of which one-half, or \$18,027.19 was taxable, to the defendant Julius Wild, as his share of the community income; and assuming further that Julius Wild was entitled to the non-business deduction as set forth in his return, Government Exhibit No. 2, that is \$1,941.36, so that his net income was the sum of \$16,085.83; and assuming further that he was entitled to the earned income credit as [213] claimed by him on his return of \$517.60:

What would have been his total tax liability to the United States on his individual income tax return for 1942? A. \$4918.42.

Q. What was the amount reported by him as due on his individual income tax return for 1942, Government Exhibit No. 2? A. \$964.72.

Q. Will you compute the difference between the amount you found to be due in the hypothetical question and that which he reported in Government Exhibit No. 2?

A. The difference is \$3953.70.

Q. Mr. Mytinger, assuming that during the calendar year 1943, Julius Wild was married and had no other dependent, assuming further that he and his wife filed separate returns for such year, each

(Testimony of Hubert C. Mytinger.)

purporting to report one half of the community income and deductions as shown by Government Exhibits 3 and 6 respectively; assuming further that each claimed one half of the personal exemption allowed by law, that is, \$600 as set forth on said return; assuming further that the community, that is, Julius Wild and his wife, received dividends on stock owned by them in the California Jockey Club and Orpheum Building Company, both California corporations, in the amount of \$3671.60 as set forth in the returns to which I have directed your attention, of which amount \$336.02 was taxable as income based upon the determination of the Bureau of Internal Revenue as to [214] taxability of dividends of those corporations for that year; assuming further that the community received net income from the business of bookmaking in the amount of \$31,598; so that the total community income was the amount of \$34,934.02; assuming further that the community was entitled to all of the non-business deductions set forth on the returns, Government Exhibits 3 and 6, respectively, that is \$536.19; so that the income tax net income of the community was the sum of \$34,397.83 and the Victory tax net income of the community was the sum of \$34,934.02, one half of which amount should have been reported by the defendant Julius Wild on his individual income tax return for 1943:

What would then have been the total liability of defendant Julius Wild for income and Victory

(Testimony of Hubert C. Mytinger.)

tax to the United States for the calendar year 1943 on his individual return? A. \$5919.80.

Q. Will you state the amount of tax liability for income and Victory tax reported by the defendant Julius Wild on his individual return for 1943, being Government Exhibit No. 3?

A. The amount reported on line 16, page 4 of that return is \$829.78.

Q. Will you compute the difference between that which you state would have been due based upon the hypothetical question and that which he reported in the individual income tax return filed by him? [215]

A. The difference would be \$5090.02.

Mr. Campbell: You may cross examine.

Cross Examination

Mr. Belli: Q. Mr. Mytinger, is it? Is that the *cross* pronunciation? A. Mytinger.

Q. The total of the three years, 1941, '42 and '43, according to your computations, Mr. Wild was short in the payment of taxes in the total amount of \$10,075.72? Am I correct on my addition?

A. I haven't totaled those, counsel.

Q. Well, let's do it. A. All right.

Mr. Belli: That should equal the amount in the indictment; does it, counsel?

Mr. Campbell: Substantially, I believe.

Mr. Belli: Q. It is about \$10,000, isn't it?

A. Yes, I make it \$10,076.40.

Mr. Campbell: May I have that figure, please?

(Testimony of Hubert C. Mytinger.)

The Witness: A. \$10,076.40 on my first addition here.

Mr. Belli: Q. Was your last one \$1590.02?

A. Right.

Q. What happened to that two cents?

A. I added that in along with the other.

Q. Was it \$10,032 and no cents? [216]

A. No, \$10,076.40.

Q. Well, let's get it right. Is that the first one?

A. No, that is the other. I have \$1032.68 for 1941.

Q. For 1941?

A. Yes, right, and \$3953.70 for the second one.

Q. For 1942?

A. Yes, and \$5090.02 for 1943.

Q. Then, you have \$10,076.40 for the total, is that right? A. Yes, 10,076.40.

Q. In the hypothetical question given you for each of those years, what you have taken other than the taxpayer's declaration for income such as his dividends from the Jockey Club stock and the Orpheum Theater and his other dividends as part of your hypothetical question, the return as it comes off these three sets of cards of Mr. Krakauer—in other words, in 1941, that the net profit was \$16,932—right?

A. I have taken the figures read by Mr. Campbell.

Mr. Belli: It will be stipulated, Mr. Campbell, that that is what the net profit was in the hypothetical question?

(Testimony of Hubert C. Mytinger.)

Mr. Campbell: The net profit in the hypothetical question was testified to in the computations of Mr. Burkett and set forth in one of the Government Exhibits.

Mr. Belli: No. 13?

Mr. Campbell: I believe that is correct, yes.

Mr. Belli: All right. [217]

Q. Now, in computing income taxes, of course—withdraw. Are you the man that determines what is deductible and what is not deductible in the taxes, I mean as business expense?

A. Not necessarily.

Q. Well, maybe you can help us a little bit on this: If Julius, or Mr. Wild, during these three taxable years went down to Caliente and made book down there, and if his business were that of a bookmaker here in San Francisco, would or would not his ordinary business expenses of transportation to Caliente be deductible?

A. If they were in connection with his business, I would say yes.

Q. His business being that of bookmaker, right?

A. That I don't know.

Q. Would his hotel bills be deductible?

A. If it was in connection with his business, yes, sir.

Q. Would the transportation from the airport to the racetrack from San Diego over to Caliente be deductible?

A. If it was in connection with his business.

(Testimony of Hubert C. Mytinger.)

Q. If he took someone along with him to make book, would that be deductible?

A. Ordinarily, yes.

Q. Long distance phone calls—would they be deductible?

A. If they were in connection with his business, yes.

Q. Contributions to church, charity, even from a bookmaker, [218] would be deductible as business expenses, or just be regular deductions in income tax?

A. They would not be deductible as business deductions, but would be deductible subject to limitations.

Q. Subject to limitations?

A. That's right.

Q. Certainly, if he was a bookmaker and in his business as bookmaker he did, as some of the insurance companies do when they get too big a risk, he went out and put some of that with some other bookmakers and lost and had to cover that, that would be deductible, too, would it not, as business expense?

A. If it was part of his business, yes.

Q. Would losses by theft in the ordinary course of business be deductible as business expense?

Mr. Campbell: Just a minute. I think there should be some limitation on this. If it is to test the credibility and ability of the witness, all right, but none of these facts are in evidence yet.

The Court: That is true, counsel. Your purpose in this present inquiry is what?

(Testimony of Hubert C. Mytinger.)

Mr. Belli: It is premature, perhaps, but rather than call him back or elicit this information from an expert of my own, I thought we might do it from the Government's witnesses, because we intend to prove all of these facts.

Mr. Campbell: I suggest as a matter of law that all [219] reasonable expenses of doing business are deductible. It does not require an expert on that. I thought these questions were for the purpose of determining the credibility and expertness of this witness.

Mr. Belli: No, we stipulate to that.

The Court: What was the last question?

(Record read.)

The Court: You may answer.

The Witness: A. Ordinarily yes, in the amount sustained.

Mr. Belli: I think that is all. Thank you very much.

Mr. McMillan: At this time, if it please your Honor, the Government rests.

(Government rests.)

Mr. Belli: If your Honor please, there are some other witnesses that I understood would be called. However, if the Government does not call them, we will call them as our witnesses this afternoon. At least we will start with one.

I did intend to make rather an extensive opening statement, but I hate to lose the time this afternoon by taking time tonight to prepare it. So I

would like to proceed now and put on at least one witness.

The Court: Do you feel that an outline of your general defense might be helpful to the jury as well as the Court?

Mr. Belli: I think very definitely, yes.

The Court: I think it would be. It would help the jury [220] as well as the Court to follow your presentation of the evidence. From my experience in these Courts an opening statement on behalf of the defendant is helpful, and then correlate the evidence in the light of the general picture.

What is your disposition concerning that?

Mr. Belli: I would not be able to do much correlating this afternoon. The close of the Government's case comes rather abruptly, but I don't ask for a continuance because I am loath to lose this time to keep your Honor and the jury here. I would be satisfied to present it all in argument.

Mr. Campbell: Would it be of assistance if we took a short recess at this time?

The Court: We might have in mind, if the Clerk has not already announced to counsel as well as the litigants and the jurors that tomorrow morning services will take place at St. Marys Cathedral for Senior Circuit Judge Garrecht, whose death has already been announced in the presence of the jury. The Mass starts at 10:00 o'clock. I have scheduled criminal cases at 11:30 tomorrow morning. So in the very nature of things we can not go forward with this case tomorrow morning.

So I would like to utilize what time we could this afternoon.

Mr. Belli: Well, I could make a brief opening statement now and then call Mr. Hughes.

The Court: Very well. [221]

OPENING STATEMENT ON BEHALF
OF DEFENDANT

Mr. Belli: Ladies and gentlemen of the jury, if I may briefly, and certainly not in the spirit of argument, but I hope in the nature of expectation, I want to tell you our theory of the defense as it will unfold to you. And I give you this so that I hope it will be of assistance for you to follow what our contentions are in the defense of my client, Mr. Wild.

It is not my purpose—and the Government was very fair in this—to defend his business of book-making, or to go again into the question of pay-offs or anything of that kind. The only thing I have to do is present the defense of this man, of Julius Wild, who is charged with wilfully evading and failing to report his income tax.

We will not do that under the subterfuge of any agents nor will we rely on Julius Wild's business activity or business acumen or lack of it.

I think the evidence will show, and we will go into it more elaborately, the operation of Julius Wild's business.

You have heard a little bit of it in this place called "the room," where Mr. Wild operated.

The evidence will show further these cards here that the Government has introduced would give us an indication from the last witness, if these were run up, the totals and the deductions taken on these

cards; if you would assume these cards to [222] be correct, then Julius Wild owes the Government at the present time some \$10,000 in taxes.

We are going to show you as was indicated with Mr. Krakauer, that a great deal of Mr. Wild's business was transacted out of "the room".

We will call Mr. Hughes, Mr. Bob Hughes, one of the gentlemen who went to Tijuana with Mr. Wild, who went down to Mr. Kyne's track down the Peninsula here, and we will show because of the odds Julius Wild gave over the telephone to make the business attractive and attract other people in the nature of advertising, that in the very nature of his business outside of "the room" here, that Julius Wild lost heavily.

We will also show that the so-called, to use the vernacular, "smart money" took Julius Wild on the telephone, and the runners from the various clubs that came into the room, other than the room that Mr. Krakauer was in, took Julius Wild and took him heavily.

We will try as best we can to reconstruct, ladies and gentlemen, the financial picture for you over this period of time, showing you Julius Wild's worth and the net worth audit at the time of the beginning and at the end of the period and show to you what his taxes were and should have been just as he described them to Uncle Sam.

We are not going, ladies and gentlemen—and this is not in the sense of argument, but so you will follow our testimony—to [223] castigate Mr.

Krakauer. If things in here are factual we will accept them as fact.

Mr. Hughes will testify on those cards. However, ladies and gentlemen, the evidence will show that Mr. Wild had other records, and that he told the Government he had other records at or about the time the informer, or Mr. Krakauer, left Mr. Wild's employ, that those records likewise have disappeared. We cannot prove those things with the records, but by our theory and evidence we will give you an inference, and his Honor will instruct you on that at the end of the case. The inference is that if this man who signed the receipts—that all of the records were left with Mr. Wild—took these records, here, that he likewise took other records that Mr. Wild had. At least, we will establish beyond any question that Mr. Wild did in some fashion keep other records of the Winter book, the losses on Seabiscuit, and some horses like that, and some horses he had in Caliente, and some he had in San Diego.

We will show that Julius Wild—and we won't claim all of these deductions for his generosity, or for his entertainment, nor will we claim that these times he went out on one of what one of these witnesses characterized as "binges" are deductible items, but we will show he was under heavy expense when he went to Caliente. He maintained a room every week, whether he was there, or not, in the hotel at Caliente. [224] He paid for the hotel and automobile, and he paid for Mr. Hughes and the various expenses he had.

We will show you in one count alone a fabulous character in Arizona, who took Julius Wild for a month and a half for a large sum of money.

We will establish and prove that to you, that that, ladies and gentlemen, is a deductible item that appears nowhere within these cards.

We will prove that by one of the witnesses who have been subpoenaed by the Government and a witness who was not put on the stand by them, one of Mr. Wild's former employees.

We will show you in one instance along in the work sheet that Mr. Callahan prepared, in attempting to give the Government a correct picture of these taxes, that he all through the year declared the rent as \$100, whereas, as a matter of fact, and in truth, ladies and gentlemen, the rent was \$117.

We will show, if anything, Julius Wild actually erred on the other side; rather than owing Uncle Sam anything, and after we show what Julius Wild has lost in "the room", and down in Caliente, and what he lost because of some of the "smart money", that he overpaid rather than underpaid his taxes.

We will call Mr. Callahan, the man that was supposed to prepare the returns. He will tell you, I believe, that he gave no figures, whatsoever, to Mr. Krakauer, that any figures that Mr. Krakauer had he got, himself, or got from Mr. Wild; and [225] if the figures on the cards that were brought up to the Internal Revenue and represent the taxes that were paid, were less than what were on these cards, the reason is because in Mr. Wild's book

had these deductions from Caliente, and from the man in Arizona, and from Bill Kyne down at Bay Meadows, and the rest of the places that don't appear here, and admittedly they don't appear here because these are in "the room" and in "the room" only.

Our theory, ladies and gentlemen, is that here is a situation where Uncle Sam is claiming he is a partner in a bookmaking establishment; and being a partner in a bookmaking establishment, ladies and gentlemen, we will show you that we are entitled against our other partner to take any more deductions and show you the picture of the whole business, rather than rest and rely on the part that Mr. Krakauer alone gave you. And we will submit, ladies and gentlemen, after we have shown you the true picture of this, in all due respect, that Uncle Sam, the other partner, really owes us money, and we will ask and expect at your hands in all sincerity a verdict of acquittal.

May we call Mr. Hughes?

ROBERT E. HUGHES,

called as a witness on behalf of defendant; sworn.

The Clerk: Q. Will you state your name to the court and [226] jury?

A. Robert E. Hughes.

Direct Examination

Mr. Belli: Q. You were subpoenaed by the Government, were you not, Mr. Hughes?

A. That's right, sir.

Q. Let me ask you, presently what is your oc-

(Testimony of Robert E. Hughes.)

cupation? A. I am an electrician.

Q. Were you working for Julius during 1941, '42, and '43? A. '41, '42, and part of '43.

Q. You left, I presume, in 1943 to go into war work? A. That's right, sir.

Q. How long were you away from Julius?

A. Pardon me?

Q. How long were you away from Julius, then? Did the place close, there, or what happened?

A. I understand right after that it did.

Q. When you first went there was Mr. Krakauer working for Julius? A. No, sir.

Q. How long after you were there did Mr. Krakauer come?

A. The first time I saw Mr. Krakauer was approximately in 1936. [227]

Q. What did he do at Julius' establishment?

A. Nothing at the time.

Q. Well, when you went there and you were there, what were his duties?

A. He came downstairs and helped me—as he stated, I had the room upstairs. The book was closed as far as—

Q. What year is this? A. 1936.

Q. Let us go a little bit ahead of that; let us go on up to 1941: In 1941 where was Mr. Krakauer working—what part of the establishment?

A. He was working as a ticket writer on the left-hand side of the counter as you approach it.

Q. How many employees were there?

A. Two ticket writers, one cashier, one door-man and myself.

(Testimony of Robert E. Hughes.)

Q. Now, by the expression that has been used here, "the room", will you give us just a brief description of how the bets were handled in the room there? Was there anyone that supervised it or was in charge of the room, or what? Was Mr. Krakauer in charge?

A. No, I was in charge of the room play.

Q. The room play means what? What happened in the room?

A. The customer comes into the room; he goes up to the board, which was hung on a swivel. Numbers, approximate odds, and the horses' names, and the weights and jockeys were on the board. [228] In front of that was a line laid—brought up to date and laid by Mr. Wild with approximate odds that you could either take and declare, or you could take the track odds. Mr. Krakauer wrote tickets, and another fellow wrote tickets, and I supervised and watched the tickets as they came in, to see that the approximate odds were correct and that the bet was not out of line as far as big play was concerned.

Q. Were there any telephone bets taken in the room—what we call the room, here?

A. No, no telephone bets; that was handled separately.

Q. That was entirely separate?

A. That's right.

Mr. Campbell: May I have the last two answers read, please?

(Record read.)

(Testimony of Robert E. Hughes.)

Mr. Belli: Q. Anybody that wanted to bet in the room had to come in there?

A. In front of the counter, yes, sir.

Q. Then you had, shall we say, an exclusive clientele, or perhaps a clientele that did not like to come in, that telephoned in?

A. No, there was only a limited amount on the phone, but they were more or less big betters and didn't like to come into the room and advertise their business over the counter.

Q. All right. Now, let's stay with the room just a minute [229] and refer to these three exhibits here. You have had an opportunity to go over these, Mr. Hughes? A. Yes.

Q. By "these" I refer to Exhibits 7, 8, and 9.

A. Yes, sir.

Q. We have had part of this from Mr. Krakauer. He kept part of the card, did he, and you kept the other part?

A. Well, I didn't keep it. All I did was enter my writing, the figures on there, and the cards were kept by him exclusively.

Q. Just take one of the cards, there. You can take one of them out, but don't get it out of place, and just give us a fast resume as to how you made notations down there, and what was done in the ordinary custom.

A. On the front of the card the fixed and various expenses for the day appeared—or this is, as I understand, a Saturday card.

(Testimony of Robert E. Hughes.)

Q. Let me stop you for the sake of time. Would you say that Mr. Krakauer's explanation of that was correct? A. Absolutely.

Q. Fair enough. Just show us, starting from there, what you put on the card, and what he put on the card.

Mr. Campbell: Will you refer to the date of the particular card?

Mr. Belli: Yes. [230]

Q. What is the date of the particular card?

A. January 4, 1940. I think that is the one you used.

Mr. Campbell: Q. January 4, 1941?

A. Yes.

Mr. Belli: You can use this photostat of the card or the original, whichever will be clearer to you.

Mr. Campbell: The clerk has 12 cards.

Mr. Belli: Q. Just tell us what you put on and what he put on, and if your Honor has no objection I can give these others to the jurors so that they can follow. Which side are you going to look at? A. This side.

Mr. Belli: All right.

(Cards handed to jurors.)

Mr. Belli: Q. Have you any more of those?

A. Here is one. I would rather have the originals.

Mr. Belli: Q. Now, will you explain it to us?

A. On my card, it is the top four items on the front, the papers, the forms, salaries, and the jani-

(Testimony of Robert E. Hughes.)

tor, were in Mr. Krakauer's handwriting and were usually always made in ink. They were a set figure. The next three items are in pencil and are printed, and those are my entries, and that is all on that side of the sheet.

Mr. Campbell: May we have identified the three items?

Mr. Belli: Q. Read them. [231]

A. The one marked "Ext-Rent-Nut." Those three are in my handwriting and are my entries, and that is all on that side of the sheet.

Q. All right, anything on the other side that is in your handwriting?

A. The other side of the sheet, the figure under "Credit" of three three seven two is mine. The payout of two nine six three eight five is mine. The expense of three one six six five is mine. The over and short of forty-eight fifty is mine, and the total of thirty-three twenty-nine is mine. Under the credit side of thirty three seventy two, that is mine. The subtraction is mine, with the figures "Total gain today \$43," is mine, and that is all.

Q. At the end of the day, if you would have \$43 would that be in cash?

A. That would be in cash.

Q. Did Julius keep the bank account?

A. Pardon me?

Q. Did Julius keep the bank account?

A. In the book, you mean?

Q. Yes. A. Oh, yes.

Mr. Campbell: Pardon me, Mr. Belli, we have had two Juliuses here, Julius Wild and Julius

(Testimony of Robert E. Hughes.)

Krakauer. Do I understand that when you say "Julius" you are referring to the defendant? [232]

Mr. Belli: Yes, when I use the term "Julius" I am referring to Julius Wild. I did not know that Mr. Krakauer's first name was Julius.

Mr. Campbell: I just want to get that straight.

Mr. Belli: I should say "Mr. *Weil*," but I slip and say "Julius," and when I do it is Julius Wild to whom I am referring and not the other witness.

Mr. Campbell: Yes.

Mr. Belli: Q. With reference to the \$43, that would be given in cash to Julius?

A. At the end of the day it would be.

Q. Where did he have bank accounts, if you know?

A. The only bank account he had in the beginning that I know of was he had an account at the Day and Night Bank at Powell and Market.

Q. Any others that you know of?

A. And he had one checking account at the American Trust over at Civic Center.

Q. How long did he have that one?

A. It was only within the last—Well, I would say as of 1942, or maybe at the beginning of 1942. That was when I found out about it.

Q. Were any deposits made to any other bank accounts?

A. That I couldn't tell you, because I didn't handle that part of the business. Mr. Krakauer handled that, likewise. [233]

(Testimony of Robert E. Hughes.)

Q. In other words, after the cash was given to Mr. Wild, Julius, at the end of the day that is all you saw of it? A. Yes.

Q. And still there was a daily loss or dividend paid by Julius?

A. To bring it back, to bring the bankroll up to a working amount.

Q. Would that card you have in your hand for that day reflect all of the activity in that bookie establishment of all of the profits or all of the loss?

A. For goodness sakes, no.

Q. What? A. No, no.

Q. Why? Explain that fully, can you?

A. To get into the room you came downstairs and there was a number of what we call runners who were fellows who would have a long sheet of paper with a certain amount of bets on them, and they would come in to Mr. Wild, who was sitting at his desk, and would lay the piece of paper down in front of him, and they would ask him if he wanted—

Mr. Campbell: Just a minute, before we go into the conversation I want to have the foundation established.

Mr. Belli: Where did the runners come from? As a witness I ask you for the names of the places where the runners came from, if you can remember.

A. One would be the Kingston Club; another would be the Greenwall [234] Club—

Q. Go ahead—Have you any other books?

(Testimony of Robert E. Hughes.)

A. Well, I never knew where they came from. All I know is that people came in there.

Q. On the average day of business, how many would come in?

A. Anywhere from two to ten.

Q. Would they be the same people, or different people?

A. They would be different people and would be—sometimes they would come in the morning, and sometimes they would come back in the afternoon. Especially, if the California tracks were running, they would come in in the morning for the Eastern tracks, and come back in the afternoon for the California tracks.

Q. That does not appear on any of those cards.

Mr. Campbell: I object to that unless he knows what was in the other entries.

The Court: Objection overruled.

Mr. Belli: Q. In the ordinary course of business of the room, would any of this business appear on that card? A. No, sir.

Q. Why not?

A. Because it was handled altogether separately.

Q. Why didn't Mr. Krakauer participate in that activity?

Mr. Campbell: I object to that as argumentative.

Mr. Belli: If you know. [235]

The Court: It is argumentative, I suppose.

Mr. Belli: Q. Did Mr. Krakauer have anything to do with this part of the business, at all?

(Testimony of Robert E. Hughes.)

A. No, sir.

Q. Who else besides yourself and Mr. Wild took care of this part of the business?

A. Nobody.

Q. Now, was there any record made of the winnings and the losings on these bets?

A. Yes, there was.

Q. And where was that kept?

A. It was kept in a little black book, I should say a book of about 6x8.

Q. Have you seen the entries in there?

A. Oh, in fact, if the book would be open, why, my entries would probably be in there as well as on this card.

Q. Your handwriting? A. Yes, sir.

Q. Did Mr. Krakauer have access to that book, too?

A. That I couldn't tell you because I do not know.

Q. With reference to the telephone bets, how were they arranged and how were they made?

A. Well, the phone would either ring and I would answer it, or Mr. Wild would answer it, and when the players would make their bets over the phone, why, they would be accepted— [236] the regular players, the *best* would be accepted without reservation.

Q. By regular players, you mean people who had established credit? [236-a]

A. Yes, that's right, they would make their bets and no matter what the bet was, we would take

(Testimony of Robert E. Hughes.)

it. We always figured we could take and lay the bet off if it was too large, or if it was on a hot horse, and we didn't want to handle it.

Q. How much of your business was done in the room by Mr. Krakauer, handled as shown by the card and business in the room you and Julius were running?

A. I would say it varied. If the California tracks were running, I would say that the phone and telephone pad bets were larger than the room play.

Q. The room play that Mr. Krakauer was in?

A. That's right.

Q. Where were your biggest winnings, or where were your biggest losses, in the Krakauer room or in the room you and Julius ran?

Mr. Campbell: Objected to as not the best evidence and calling for this witness' conclusion.

The Court: I will overrule the objection. You might answer that.

Mr. Belli: Q. Do you have the question?

A. The room play, as I may put it, as long as you are using vernacular, was "bread and butter." In other words, they always figured this would always be there.

Q. By "this" you mean what?

A. The room play would always be there, it was always steady; but the other bettors, why, when they won, sometimes you would [237] not see the runners, especially, you wouldn't see them for maybe two or three days because they would figure

(Testimony of Robert E. Hughes.)

Julius would have to cool off if they "knocked him in the creek," as we call it, so they might not come back for two or three days.

Q. Why was it there was any difference in that type of play from the runners, the smart money and the people who bet in the room that Mr. Krakauer was in?

A. That is very easy. When the runners would come in, if I can use a runner for an explanation—a runner would come in. He would lay down a sheet with the large amount of various bets. In order for him to claim those bets, he would have to take, or they would have to be taken at a price, a set price regardless of what the mutuel board at the track. Now, there has been cases where the mutuel at the track was larger, but in 98 per cent of the time I would say the mutuel at the track was considerably smaller. We would lay a horse, possibly, say for \$10 at ten to one. The pay-off would be on that particular horse, \$110, ten to one and your money back.

Q. Would your odds in the room on the same horse and the same race be better or lower—

A. No, the minute the runner would come in and we would see that, we would immediately cut the room odds on him. Now, if the man in the room wanted to bet it beforehand he could have ten to one, but as soon as we found there was money for the horse, the odds were usually cut, approximately in two. [238]

Q. All right, continue with the reason for the difference.

(Testimony of Robert E. Hughes.)

A. When the bet was accepted at \$10, say, at ten to one, and the horse won, you would find, as I told you in 98 per cent of the cases the horse would pay considerably smaller in the mutuels. The reason for that would be because when they would get all their money set in town with the bookmakers, they would be satisfied and figure any price was a good price if the horse would win. So they would send all the rest of the money they collected together down to the track which would naturally cut the mutuel play and cut the odds on the horse. If the horse won, he would pay ten to one, or \$22, and you would find in numerous cases, too numerous to mention, and anybody with any experience would find that after the track he probably would pay around \$8, which would be approximately three to one. So therefore this business was no good, but Mr. Wild for some reason or other persisted in keeping it both as additional to the room and also to keep informed on what was going on around town.

Q. How about other bookies, as the custom of the business, would they have the two separate rooms like that?

A. Absolutely; every book does.

Q. In other words, they have one room where you come in and bet over the counter, and a different set of personnel handles that from the personnel that handles the room where you telephone them in. [239]

A. Not necessarily. A man worked in the busi-

(Testimony of Robert E. Hughes.)

ness—well, the same man or two men could handle both rooms at the same time. You have time in between races to take care of that.

Q. Can you tell us, in lieu of our records on the room that you and Julius were in, did you win in 1941 through the year on that room or did you lose, or what was the situation?

A. As far as—well, without any figures to substantiate me, I would say the inside room was always loser.

Q. How about 1942 and 1943?

A. 1942 the same way, and as far as I know, 1943 was just as bad.

Q. Now, we haven't got any records to substantiate this room which you say lost, so you do us the next best thing and give us the names of the big bettors, who were there, so we can establish if there was any winnings or losses.

A. Dr. Shornek.

Q. How do you spell that?

A. I don't know.

Q. Would it be S-h-o-r-n-e-k?

A. That would be close enough. Mr. Krakauer, if he was here, could tell you.

Q. We won't trouble him again. We will ask you. Go ahead.

A. He had placed bets, or he had a system whereby he bet—

Mr. Campbell: Just a minute. I object to this. This has no bearing on the issues. [240]

(Testimony of Robert E. Hughes.)

Mr. Belli: Let me lay just a little further foundation with respect to that.

The Court: I think you should lay a foundation. The identity of this doctor may be established in terms of his operations.

Mr. Belli: We will refer to him as operator No. 1.

Q. This operator No. 1, as a matter of fact, established a credit with you, didn't he?

A. Yes, sir, between \$2000 and \$2500.

Q. When did he establish that credit with you and how, so that we can check that?

A. The only way that that could be checked, if I may say, Mr. Krakauer kept a book that every morning when the previous sheets, racing forms, would come in, he would immediately or that night if he could obtain them after 10:30 or 11:00 o'clock, he would stay there and he would sit down and make in this book all the entries of the system that operator 1, as you call him played.

Q. Why was that done by Mr. Krakauer, if you know?

A. Well, he—

Mr. Campbell: Just a minute. I suggest this is all immaterial and incompetent.

Mr. Belli: We will connect it up, I assure you, your Honor.

The Court: Mr. Krakauer did testify either on direct or [241] cross examination that he had a pattern worked out.

Mr. Belli: Exactly.

The Court: And if it suited his particular purpose he would make a bet or small bets if play

(Testimony of Robert E. Hughes.)
meshed with his idea and notions. I assume you are coming to that pattern.

Mr. Belli: Exactly, your Honor.

The Court: All right, go ahead.

Mr. Belli: Q. What did Mr. Krakauer tell you with reference to this out-of-state operator's pattern?

Mr. Campbell: That is objected to as incompetent.

The Court: Objection overruled.

The Witness: A. Mr. Krakauer said it was the best system he had ever played and he started to play it, but on a very small scale.

Mr. Belli: Q. Tell us the scale this out-of-state operator played on, and tell us how he played, and whether Julius won or lost.

The Court: One moment: Do I understand this witness handled these transactions?

Mr. Belli: To be sure, I better see.

The Court: Q. Did you handle these yourself?

A. In the beginning I did, sir.

The Court: Specify the dates.

Mr. Belli: Q. Specify the dates and give us every bit of information you can resurrect out of your mind on this. [242]

A. The dates I couldn't tell you, but I know it was between 1941 and 1943—I would say between 1940 and 1943. The figures would be substantiated by a large book, that the winter book bets were kept in, and operator No. 1 books were kept in.

The Court: That might well be in the year 1940, however.

(Testimony of Robert E. Hughes.)

The Witness: No, I don't think so, because we had the Santa Anita Handicap at that time and that was enough business to keep track of and we did not handle the other one.

The Court: All right.

Mr. Belli: Q. Then, after the account was established with you, you say for a couple of thousand dollars? A. Yes, sir.

Q. Tell us what this operator did.

Mr. Campbell: May I ask a question on voir dire?

The Court: Yes.

Mr. Campbell: Q. You say you personally handled this for a period of time?

A. Just for a few days, sir. I would come in at 9:00 o'clock in the morning and I left immediately after the races were over.

Q. How many days did you handle it?

A. For about a week.

Q. When was that week? When did it begin? Was that after the beginning of the play?

A. That was the week Dr. Shornek first sent his money in. [243]

Q. And you didn't handle it after that?

A. No, sir.

Q. You had nothing to do with it after that?

A. Outside of watching it and checking with Mr. Krakauer to make sure that the amount was right and the prices were right.

Q. Did you make any entries with respect to the play after that? A. No, sir.

(Testimony of Robert E. Hughes.)

Q. In any book? A. No, sir.

Q. So that all the information you had after that first week was what others may have told you? A. No, sir.

Q. What information do you have, that is, the source of the information?

A. That the plays were marked down in this book.

Q. Did you mark them down?

A. No, Mr. Krakauer did.

Q. Did you see the information, the original documents from which he got the information?

A. Yes, sir, that was all underlined and cut out.

Q. What was the nature of those documents?

A. The racing forms where the plays were determined from.

Q. Did you see those and maintain those documents? A. No, I didn't. [244]

Q. Did you see this operator No. 1, as you call him, in connection with those bets after that first week? A. No, sir.

Q. Did you see any correspondence or writing about it? A. Yes, sir.

Q. Letters? A. Yes, sir.

Q. After the first week? A. Yes, sir.

Q. Where were those, if you know?

A. I don't know; Mr. Krakauer handled those.

Mr. Belli: Q. Mr. Who?

A. Mr. Krakauer.

Mr. Campbell: Q. When did you last see those letters?

(Testimony of Robert E. Hughes.)

A. I saw them as they came in, and that is the last time that I ever saw them.

Q. Did they set out the terms of the bet?

A. The first letter did.

Q. Did the following letters do so?

A. No, they just asked for money.

Q. They were just requests for money?

A. Yes.

Mr. Campbell: I submit the testimony of this witness should be limited to the period he was handling these entries.

The Court: I think so. [245]

Mr. Belli: Well, if he knows for the whole period.

The Court: This witness claims Mr. Krakauer saw the letters.

Mr. Belli: If I put him on, then I have to vouch for his truth and integrity and I don't care to do so.

The Court: I understand, but the fact appears, however, uncontradicted from this witness, that Mr. Krakauer handled the transactions in the main.

Q. Is that right? A. Yes.

Mr. Belli: But he was as familiar with Mr. Krakauer.

The Court: Only up to a certain point does he claim familiarity with those.

Q. Is that correct?

A. As far as keeping and handling of them, yes.

Mr. Belli: Let's find out.

(Testimony of Robert E. Hughes.)

The Court: All right.

Mr. Belli: Q. We are going to ask you about this operator's system only to see if Julius won or lost in this period of time; so will you tell his Honor and the ladies and gentlemen of the jury how this operator first established the contact with Mr. Wild and how the deposits were made and then how he started operations and then up to the time when you stopped handling it personally, whether Julius was winning or losing.

Mr. Campbell: I object to the question and ask it be [246] limited to the statements made to him and during the period.

The Court: Objection overruled. You may answer the question.

Mr. Belli: Q. Go ahead.

A. The first time I ever heard of the transaction to which you refer was when Mr. Wild came from down south.

The Court: Now, fix that time by reference to an event. It might be a handicap or it might be some other event that stood out in your memory so we can get the dates here.

The Witness: I again say, it is practically impossible. I am not of the type—

The Court: Was it in the year 1940?

A. That I couldn't tell you. I haven't any idea.

Mr. Belli: Q. Can you place it in relation to some event? A little while ago you thought something about the Santa Anita Handicap. Can you place it before that?

(Testimony of Robert E. Hughes.)

A. No, I can not, because we book the Santa Anita Handicap every year in the winter book.

Q. But it would be later in the year than the Santa Anita Handicap?

A. Yes, later in the year than the Santa Anita Handicap.

Q. And the Santa Anita Handicap is when?

A. March 15.

Q. So you would have to place it after March?

A. That is right. I would say it would be after March. [247]

Q. All right, that gives us the time of the year, but it doesn't give us which year.

A. It would have to be in the year 1941.

Q. Why do you say that?

A. For the simple reason that in 1941 when the war started I was in the California State Guard and I was called on active duty and I only worked part time when I could from November 8 until April and they were not handling it then. So it was previous to December 7, 1941. That is the closest I could give it, so it would be between then.

Q. It would be safe to say it was between March and December of 1941?

A. I would say yes.

Mr. Belli: I am sorry. I have run beyond 3:00 o'clock. I did not mean to. Does your Honor care to take the recess now?

The Court: Ladies and gentlemen of the jury, we will take the afternoon recess. Please bear in

(Testimony of Robert E. Hughes.)

mind the admonition not to discuss the case among yourselves nor converse with any person on any subject connected with the trial of the case, nor are you to form or express any opinion thereon until the case is finally submitted to you.

(Recess.) [248]

The Court: Proceed.

Mr. Belli: Q. By the way, you gave the Government a full statement of anything you knew about this, didn't you?

A. No, sir; they never asked me.

Q. Did you give them a statement, an interview?

A. Yes, I gave them an interview on those cards, my figures on the cards, and a definition of the various items on the cards, the ones that are in my handwriting; the parts on the bottom in ink, I never did know what it meant, or for that matter I wasn't even interested.

Q. Tell us about this out-of-state operator. There were some letters from him?

A. That's right, sir.

Q. And do you know—strike that.

Did you see these letters in Mr. Krakauer's possession?

A. Yes, sir. He kept track of those.

Mr. Belli: I think for the record I will ask your Honor this question first. I would like to get from this witness as close as possible the address of the man. Should we do that after court, and then put it in the record?

(Testimony of Robert E. Hughes.)

Mr. Campbell: I have no objection to asking him that.

Mr. Belli: Q. What is the address of the man?

A. The only address I knew of it was Phoenix, Arizona.

Q. Now, money was sent to him, wasn't it?

A. Yes, sir. [249]

Q. Where was it sent, and how?

A. It was handed to Mr. Krakauer in cash, and how Mr. Krakauer sent the money to him I don't know.

Q. All right. Coming back to the first transaction, tell us how the credit was established, and what was done, and what the system was.

A. \$2,000 was the first amount that was given to Mr. Wild to establish a credit. The system was very simple and very easy. \$200 flat bet to place on any horse on any track that was in the racing form, where equivalent odds were posted, where the horse was 120 to 1 in equivalent odds or less. Any horse that was 120 to 1 or over—I mean over 120 to 1, whether it was 125 or what, he was not considered. The horse had to be 120 to 1 or a mutuel price of four forty at a track, or under. A standing bet of \$200 to place was stipulated.

Q. Was that by letter, or how was that stipulation?

A. No; that was the way the system was explained to us by Mr. Wild, and that is the way the bets were to be placed in this book to keep track of them.

(Testimony of Robert E. Hughes.)

Q. All right. Now, where were those bets placed, in your room or Mr. Krakauer's room?

A. No; it was placed in the back room, in the pad.

Q. All right. Now, you handled that, you say, for about a week? [250]

A. Yes, sir.

Q. How many of those did you handle?

A. Well, the place averaged anywheres from, oh, I would say from five plays to fifteen plays a day.

Q. At 200 to 1?

A. At \$200 a play.

Q. At \$200 a play?

A. That's right.

Q. All right. Now, of your own knowledge, how long did this play with this chap continue?

A. I would say approximately three to four months.

Q. At the end of that period of time did you have a discussion with Mr. Wild pertaining to the continuance of this account?

A. Naturally.

Q. And what was concluded? Give us the conversation.

Mr. Campbell: Just a moment.

That is objected to as calling for hearsay.

Mr. Belli: Well, strike that, what was concluded.

Q. Tell us what was done with the account.

A. If I am not mistaken, Mr. Krakauer was also present at the time, and the three of us discussed that the play was one that—

Mr. Campbell: I am going to object to the discussion, if the Court please. He can state what was done. [251]

The Court: The objection will be sustained to the discussion.

Q. Was the play continued or discontinued?

(Testimony of Robert E. Hughes.)

A. It was discontinued.

The Court: All right.

Mr. Belli: Q. Do you know how much had been lost up to that time on the play?

A. The exact figures, no.

Q. About what?

A. I would say between \$2,500 to \$4,000.

Q. Now, were there any other bets or large amounts that were taken in there, such as this out-of-state operator?

A. Well, there would be players that would come down there and lay a deposit and would bet, and then sooner or later, why, they would withdraw their money and quit.

Q. Was Julius a good handicapper, Julius Wild?

Mr. Campbell: That is objected to as calling for his conclusion.

Mr. Belli: Q. If you know. Do you know of your own knowledge whether he lost on his own bets? A. Yes, he did.

Q. Can you tell us the source of your information? Give us the dates.

A. Well, Julius owned horses and—

Q. Is any of the hay, the feed, or the cost of the horses he [252] owned in these tickets?

A. No, sir.

Q. Did he own horses during this period, '41, '42, '43? A. Yes, sir.

Q. Where did he own those horses?

(Testimony of Robert E. Hughes.)

A. Well, mostly in the State of California, wherever—

Q. Did he run his own horses?

A. No, sir; he had a trainer.

Q. He paid the trainer?

A. He paid the trainer.

Mr. Campbell: Just a moment.

This is calling for this witness' conclusion, if the Court please. There is no foundation laid for this man's knowledge.

The Witness: Yes; I saw Mr. Wild pay Mr. Fitzgerald on numerous occasions.

The Court: Q. Who was the trainer, Mr. Fitzgerald? A. Mr. Fitzgerald.

Q. What was his first name?

A. Well, I don't—

Q. Well, whatever it was, at least you saw the defendant pay Fitzgerald? A. Yes, I did.

The Court: All right.

Mr. Belli: Q. Where? [253]

A. Right in the back of the book. He would come down there for expense money and his salary.

Q. Now, how would Julius pay him?

A. In cash.

Q. Did he take a receipt? A. No, sir.

Q. Where would the cash come from?

A. From his pocket.

Q. Did Julius carry large sums of money on his person? A. At all times.

Q. How many horses did he have during this period?

(Testimony of Robert E. Hughes.)

A. He had anywheres from one to about seven.

Q. His horses won, did they, in the races?

A. Not too consistently.

Q. Well, taking it over a period of '41, '42, and '43, do you know if his horses won or lost?

A. His horses lost more than they won.

Q. Have you any idea—

Mr. Campbell: Now, just a moment.

I am going to ask that the question and answer be stricken. The question "lost more than they won" can refer to the number of races or to the money.

The Court: I will grant the motion to strike. The very nature of this business is such that some latitude has to be allowed to this witness. This witness, as I understand [254] it, bore an intimate relationship to the defendant.

Q. You were there every day with him, weren't you?

A. That's right, sir.

Q. And did you undertake to watch the returns on his horses when they ran?

A. Well, I bet on them most of the time.

Q. You bet on them?

A. Yes, sir.

Q. You lost, too?

A. I lost.

Mr. Campbell: I simply wanted to point out, your Honor, that in regard to this testimony, a horse, of course—as the inference is here, a horse can only run into the money one or two times out of a number of times that it runs. But its purses may exceed its cost of maintenance and training. The number of races it wins is not a criterion.

(Testimony of Robert E. Hughes.)

The Court: Well, do I understand, counsel, both for the Government and the defense, that as an adjunct to the Defendant Wild's business he operated stables, in the accepted sense, to the end that he could charge and deduct hay and the usual expenses incident to the operation as against the winnings?

Mr. Campbell: I question that situation very seriously, your Honor.

The Court: Is this the first knowledge that you have [255] had on that score?

Mr. Campbell: Well, I have very, very conflicting knowledge. I perhaps shouldn't state it in the presence of the jury.

Mr. Belli: I have no objection.

The Court: I merely want to know the scope that we can expect on the evidence here. We are going into a field now that is entirely separate from the operation of a book, and are you prepared to prove, counsel—

Mr. Belli: He was in the business from all ends, I think, your Honor. That is about as far as I want to go. Just to show the general character, that he certainly wasn't into the business in the magnitude, say, of Mr. Howard, or someone like that, but he did have a couple of horses here, apparently, and he tied up his business, not only with the book, but with the horses, the money that he would win or lose in his own business. He would go down to the track, and we will show that he lost it there.

(Testimony of Robert E. Hughes.)

The Court: One further question. I think I understand generally, but I have this one question: Are you prepared to submit any records, books of account, memoranda, or other data that would substantiate or fortify any of your contentions with respect to the maintenance of the stables or the horses?

Mr. Belli: Well, let me, if I may, ask that on voir [256] dire.

The Court: We are getting—

Mr. Belli: We are in the position that all our records are gone.

The Court: And do you charge, counsel — at least, thus far you have charged—that part of the records were maintained by Mr. Krakauer; that the black book, so-called, also contained information concerning deductions on hay and the like?

Mr. Belli: I don't believe so. I will have to ask this witness on that.

Q. Did they contain anything on that?

The Court: You can examine this witness on the contents of the books. I may limit this evidence, coming as it does.

Mr. Campbell: You mean a cross examination, or on voir dire?

The Court: Right now, yes.

Mr. Belli: I might ask just one further question.

The Court: Yes.

Mr. Belli: Q. If Mr. Wild did keep any books at all on the horses and Mr. Fitzgerald and those

(Testimony of Robert E. Hughes.)

people, as such—did he keep any records or books of account that you know of? A. No, sir.

Mr. Campbell: Now, may I ask my voir dire question? [257]

Mr. Belli: Yes, sir. I was just going to ask one other question. We might ask something—we might ask the names of these horses.

The Court: Three, four, five or six horses. That is an operation in itself.

Q. You mean to say he never kept books at all?

A. That part I never did see, sir.

Mr. Campbell: May I ask these questions?

The Court: Yes.

Mr. Campbell: Q. Mr. Hughes—

A. Yes, sir.

Q. (continuing:) —you have referred here to a little black book. It is a fact, is it not, that the only records of any kind maintained by or for Mr. Wild with respect to the operation of his business were these cards, Government's Exhibits 7, 8, and 9, is that not a fact?

A. I didn't understand the question. If you will, repeat it?

Q. Weren't these the only records that were ever maintained? A. No, sir.

Q. Mr. Hughes, do you recall making a statement under oath— A. That's right, sir.

Q. (continuing): —on the 21st day of March, 1946, at Room 1907, 100 McAllister Street Building, at which were present a stenographer taking the questions and answers down, and subsequently

(Testimony of Robert E. Hughes.)

you returned, made corrections in that statement [258] and initialed each page?

A. That's right, sir.

Q. And is it not a fact that on that occasion you testified as follows to the following questions—

Mr. Belli: Have you got a copy of the statement?

Mr. Campbell: I have the original here, which I will mark for identification.

Mr. Belli: I think we are entitled to see the copy, your Honor.

Mr. Campbell: Yes.

The Court: You may show it to him, counsel.

Mr. Belli: Don't you have a copy of it?

Mr. Campbell: I don't have it immediately available. There is one.

Q. (continuing) Question by Mr. Burkett (reading):

“Q. Were any bookkeeping records of any kind kept of the race horse bookmaking business of Mr. Wild?

“Mr. Hughes: The only records were small cards.

“Mr. Burkett: By whom were these small card records kept during 1941?

“Mr. Hughes: In 1941 by Julius Krakauer.”

Now, do you recall so testifying?

A. That's correct. [259]

Q. Now, do you remember—

Mr. Belli: Just a moment. Let him finish.

Mr. Campbell: Pardon me.

(Testimony of Robert E. Hughes.)

A. (continuing) That's correct. If you will remember, in that statement you are referring to the room play, and that is the only record that was kept of the room play.

Q. I am going to show you this statement and ask you to point out to me wherein any such limitation—pardon me; I will have this marked first.

May I have this marked for identification as Government's next in order?

The Court: It may be marked for identification.

The Clerk: Government's Exhibit 14, for identification.

(The statement referred to was marked U.

S. Exhibit No. 14 for identification.)

Mr. Campbell: Q. I am going to show you this statement and ask you to point out to me where any such limitation was indicated, either by you or by the people who were questioning you (handing statement to the witness).

Mr. Belli: That is a pretty broad statement, your Honor. That would take the rest of the session to do that.

The Court: It would probably take the rest of the session to do that, yes. I suggest that the witness read it.

The Witness: I have already read it.

The Court: Q. Are you familiar with that?

A. Yes, very much so. I have a copy of it at home.

Mr. Campbell: Q. You were given a copy of it?

A. Yes, sir.

(Testimony of Robert E. Hughes.)

Q. And can you state from your familiarity, or point out in this exhibit where any such limitation was made?

A. Your Honor, this statement was made by me—

Mr. Campbell: Now, your Honor—

Mr. Belli: Let the witness finish. You asked him a question.

Mr. Campbell: Now, I wish to press for an answer to my question before the explanation.

The Court: All right.

Q. You may answer, Mr. Hughes, and then make an explanation.

A. I didn't understand the question, the way he is putting it.

Mr. Campbell: Will you read it, Mr. Reporter?

(Record read by the reporter.)

Mr. Belli: The witness, if your Honor please, was asked to state "from your familiarity."

Mr. Campbell: I will reframe the statement.

Q. Can you—

Mr. Belli: May I have an answer? He started to answer, and I submit he is entitled to.

Mr. Campbell: My question was "where, in the statement"—

Mr. Belli: No, no. [261]

Mr. Campbell: I will withdraw the question and reframe the question.

Mr. Belli: Your Honor, the question was asked, and there was an answer started. I think the witness is entitled to answer.

(Testimony of Robert E. Hughes.)

The Court: Well, withdraw the question and let him answer another one.

Mr. Campbell: Q. Mr. Hughes, will you state where, in that statement which you hold in your hand, Government's Exhibit 14 for identification, where any limitation of the questions regarding the books or records or operation was confined to any room or any particular part of Mr. Wild's operations?

A. The only inference that I can make is that this was limited; that the whole thing is based on one thing, and one thing only, and that is those cards. Every question that was asked me in this paper was about those cards (indicating).

Q. Well, you were asked the specific question, were you not, to which I have directed your attention, and you gave the answer (reading):

"Were any bookkeeping records of any kind kept of the race horse bookmaking business of Mr. Wild?" And your answer is (reading):

"The only records were small cards." That was your answer, was it not, sir? [262]

A. That's right.

Mr. Campbell: That is all.

Mr. Belli: Q. Cards were shown you at that time, were they? A. That's right, sir.

Q. The Government had them in their possession at that time? A. That's right, sir.

Q. And what was the date of that, that the Government had that in their possession?

(Testimony of Robert E. Hughes.)

A. I don't remember. You can find out in the statement.

Q. All right, let's look in the statement and see—

Mr. Campbell: Right at the top of the statement.

Mr. Belli: March 21, 1946.

Q. You are positive the Government had the cards then?

A. Yes, sir; they were shown to me, and then my statement will identify the various numbered cards in there, if they are in my handwriting, and an explanation of what is in each card. Every card that has my handwriting on there is definitely numbered in that statement. Those that are not in my handwriting are also stated in there.

Mr. Belli: All right.

May we get back to the question, now?

The Court: Yes, you may.

Mr. Belli: I am embarrassed; I have lost track, myself.

Do you recall the last question? I had been thinking [263] of something else there. I think we were referring — yes — to Mr. Fitzgerald and the race horse business.

The Court: Whether any payments were made to Mr. Fitzgerald, and the witness stated yes, that there were payments made in the room, and that they were made in cash.

Mr. Belli: Now, I don't want, your Honor, to go into the whole racing stable business of Julius

(Testimony of Robert E. Hughes.)

here. There might be a question of law whether that would be deductible or not. But I would just like to ask a couple of questions with reference to the records.

The Court: All right.

Mr. Belli: Q. Now, records were kept in connection with that? A. No, sir.

Q. Mr. Fitzgerald—can you tell us where he is, where he hangs out?

A. The race track, I understand.

Q. How old a chap is he?

A. He is quite an elderly fellow; he is so old a fellow that he might be dead now. I don't know. You will have to find out from Mr. Wild about that.

Q. Is he a man known around the race tracks?

A. Very much so. His brother is Norman Church's trainer.

Q. Now, I think counsel rightly corrected me with reference to the question I asked you being indefinite, whether these [264] horses of Mr. Wild's won or not. I refer to absolute figures of money, rather than number of races. Did they win money over all, or lose over all, during this period of time?

Mr. Campbell: Objected to as no proper foundation laid; calling for the conclusion of this witness.

The Court: Sustained.

Mr. Belli: Q. Do you know of your own knowledge whether these horses of his won money or not over the period of '41, '42, and '43?

(Testimony of Robert E. Hughes.)

Mr. Campbell: May that be answered yes or no?

The Witness: Will you state the question again?

Mr. Belli: Yes.

Q. Do you know of your own knowledge whether these horses of Mr. Wild's won money over '41, '42, and '43, or if they lost?

A. I do not know.

Q. All right. Now, let me, in the short time that remains here—

The Court: I think we will run until 4:30, on account of the services in the morning.

Mr. Belli: All right. Then that will get us pretty far along with this witness.

The Court: Is that agreeable to all members of the jury, to run until 4:30?

(Jurors nod assent.)

The Court: Thank you. [265]

Mr. Belli: Q. Now, any other operators like the chap from Arizona that you have mentioned that bet with Mr. Wild?

A. Just the various runners.

Q. How about out—withdraw that.

How about Mr. Wild, himself? Did he then bet at the track on occasion, in '41, '42, and '43, if you know of your own knowledge?

A. At every opportunity.

Q. And would he bet at the track—out of what fund of money? A. What?

Q. Out of what fund of money would he bet at the track?

Mr. Campbell: That is objected to as calling

(Testimony of Robert E. Hughes.)
for the conclusion of the witness.

The Court: I will sustain an objection.

Mr. Belli: Q. Do you know how he would bet?
Did you go down there with him?

A. Sometimes. Very, very infrequently. Somebody had to stay with the business, and I was elected. I ran his business, the room play, and most of his bets would be in from the runners, so he would leave and go down to the track, so I had to stay at the room. The only time that I ever went with him was on the weekend, when we went to Caliente.

Q. How many times did you go to Caliente?

A. I would say between six and ten times.

Q. None of the Caliente play is reflected in these sets of [266] cards? A. No, sir.

Q. By the way, when Mr. Krakauer left Mr. Wild, could you give the ladies and gentlemen of the jury a little idea of what the scene was like, if you remember?

A. No, sir; I was not working for Mr. Wild at that time.

Q. You weren't there?

A. I was over in the defense—

Q. Who else was there that would know about the termination of the employment?

Mr. Campbell: That is objected to as calling for his conclusion.

The Court: Sustained.

Mr. Belli: All right.

Q. When you went down to Caliente in '41 and '42—right? A. '41, sir.

(Testimony of Robert E. Hughes.)

Q. (continuing) —did Julius make book in Caliente? A. Yes, sir.

Q. And how would he make book down there? How did he do it in Mexico?

A. Well, they have two options down there: One, you can bet in the mutuels, or you can bet in the bookmakers, just like you do in the City here. You can either go down to the race track or you can bet with a bookmaker when the books are open here. [267]

Q. Well, did he take any money down with him?

A. Naturally. He had to take a bankroll down with him.

Q. And did he carry that in his pocket?

A. Yes, sir.

Q. Any checks, or anything? A. No, sir.

Q. And when he would get down there he would get off the plane where—San Diego?

A. No, sir; Burbank.

Q. At Burbank? A. Yes, sir.

Q. And then how would he go from there to Caliente?

A. Well, I never went with him from there. He would always leave me, and I would fly down from Burbank to San Diego.

Q. I see. How would he get down, have you any idea?

A. Yes. He would go in and meet his various friends that he knew there, and he would stay Sat-

(Testimony of Robert E. Hughes.)

urday night, and I would go down and stay in the hotel at San Diego.

Q. What is the name of the hotel?

A. U. S. Grant Hotel.

Q. In whose name is the room?

A. Julius Wild.

Q. And then you would meet Julius there?

A. I would probably meet him there the next morning and we would all go to the track together.

Q. How would you go over?

A. He hired, between him and some other fellows that lived in Los Angeles, they would go get a fellow that had a big sedan, and they would drive from Azusa, or from Los Angeles, and go down to San Diego, and then they would pick me up, and then we would go down to the race track.

Q. Then when you would get over at the race track there, what was the magnitude of the time that you were there—and give the times, the people that were there—of his operations in making book there?

Mr. Campbell: I am sorry; I didn't get all that question. Would you read it?

Mr. Belli: I will reframe it.

Q. On the occasions that you were there—and state the occasions—how large was his operations?

A. Well, that is something that you couldn't handle—I mean, you couldn't determine. We were busy, and two men were in the front, standing at a little platform, and you were just going as fast as you can, getting the bets from the players in

(Testimony of Robert E. Hughes.)

front of you and handing them back to a master sheet, and he would, in turn, hand you a *hard*, and you would get the money first, and then give the card to the man that made the bet. But the play ran anywheres between \$4,000 and \$10,000 a Sunday. There was 13 races.

Q. That was the gross? [269] A. Yes.

Q. Did he win or lose down there?

Mr. Campbell: Now, just a moment.

That is calling for the conclusion of the witness.

Mr. Belli: Q. If you know.

The Court: Sustained.

Mr. Belli: Q. Do you know whether he won or lost? A. I know he lost.

Q. How do you know that, will you tell us?

A. Because at one time he had to borrow money to pay the association off down there in order to keep his book.

Q. Which association?

A. Caliente Jockey Club.

Q. When was that? A. It was in 1941.

Q. How much did he have to pay them off?

A. I don't know.

Mr. Campbell: All this is conclusion of this witness, if the Court please. I am going to object to it.

The Court: He said he doesn't know.

Mr. Belli: Q. You don't know?

A. No, sir.

Q. By the way, during the time that you were with him here in 1941 and in 1942 and '43---and

(Testimony of Robert E. Hughes.)

this goes to his attention to his business—was he intoxicated on many occasions? [270]

A. Several.

Q. Huh? A. Several.

Q. What do you mean by “several”? I want the fact. Come on. A. Well, I would say—

Mr. Campbell: I object to that as being immaterial, unless it is a defense of intoxication, on the question of wilfulness, if the Court please.

Mr. Belli: Well, I think some of it might very well be that, but it wasn't offered for that purpose presently.

The Court: I can't see the present materiality of going into any phase of intoxication.

Q. You attended to the business at all times, didn't you? A. And also him, sir.

The Court: All right. I can't see the materiality of it.

Mr. Belli: All right.

Q. But he carried a bankroll on him, didn't he?

A. That's right.

Q. And would he bet when he was intoxicated?

A. Yes, sir.

Q. More than one occasion?

A. Whenever he was drunk he would bet. That is where it would start, usually at the race track.

Q. Over what period of time was this? [271]

A. '41, '42, and '43, at the times in question.

Q. Tell us about Julius at the place there with reference to his donations to the Red Cross, and that type of charity. Are they reflected on those cards here? A. No, sir.

ORIGINAL

No. 12053

Docketed

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for the Ninth Circuit

JULIUS WILD,

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vs.

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(In Two Volumes)

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(Testimony of Robert E. Hughes.)

Q. What do you know about that of your own knowledge?

Mr. Campbell: Well, now—

The Court: Is there any claim made in the statement or records to the Government in connection with the usual deductions for that?

Mr. Campbell: We have allowed everything claimed in the returns by way of contributions, your Honor. I don't think there is any issue there.

Mr. Belli: I think we can show they were far in excess of that in the return, your Honor.

All right, we will ask him that.

Q. Now, with reference to the magnitude of his—what do you call it—I have used the term “reinsurance”, where an insurance company takes too heavy a load, and they place it—

A. Lay-offs.

Q. Lay-offs? A. Lay-offs.

Q. Tell us about his lay-offs. Who would he place those with?

A. Well, there was three books in town, and when Bay Meadows was running, why, he laid off at the lay-off place at Bay [272] Meadows. When Tanforan was running, the same there.

Q. Now, with reference to these sleepers, who had charge of the sleepers?

A. In '41, '42, and '43, Mr. Krakauer did.

Q. Did you at any time, with any of the other employees, actually put sleepers into the envelopes and watch their transit in the business?

A. Yes, sir.

(Testimony of Robert E. Hughes.)

Q. What happened to them?

Mr. Campbell: Now, just a moment.

Let's lay a foundation here.

Mr. Belli: All right.

Q. Tell us when you did this.

A. Well, I would have to start in telling you why.

The Court: All right.

Mr. Belli: Q. Yes?

A. It was the custom down there that when a sleeper was turned in to Mr. Wild in the years before that, and even in, I would say, 1941, that Mr. Wild would open that sleeper, the envelope, and would distribute it amongst the five employees. Well, naturally, that was a little extra money, and we were always looking forward to it, and we would all keep track of any sleepers that was left over.

If I may say, the four of us back there—Mr. Krakauer, Mr. Collard, Mr. Koster, and myself—would keep track of [273] that, because after all, that was pin money, as far as we were concerned, and we looked forward to that extra revenue.

Well, for a long while, why, we got those sleepers, and fairly consistent. And then as time went on, why, it became less, the sleepers became shorter and shorter and shorter. So we couldn't figure out why. We knew there was just as many bets hanging over from the previous times.

So Mr. Koster and myself got together, and we made a sleeper, and we put it in there and watched it.

(Testimony of Robert E. Hughes.)

Mr. Campbell: Let's have the time, if the Court please.

The Witness: This was in 1941, about in either June or July.

A. (continuing) And we watched for that sleeper to be distributed, and it was not distributed.

And there was an entry made of those sleepers in a book, this same book that so mysteriously disappeared—that is—

Mr. Campbell: I ask that the words “mysteriously disappeared” be stricken, if the Court please.

The Court: That may go out.

A. (continuing) —that cannot be found.

Mr. Belli: Q. That is better.

A. And it was also placed in that book; it was a large book, about the size of Mr. Belli's book there (indicating), and there were several compartments in there. And although we [274] were very seldom allowed to look in that book, why, on one or two occasions I was able to get in there and look in there when Mr. Wild and Mr. Kraukauer and myself were checking up the amounts, and there was no record of that sleeper in there, which made the rest of the boys and I very much disappointed.

And at the time we mentioned it to Mr. Wild, but Mr. Wild—

Mr. Campbell: Now, just a moment.

I am going to object to any conversation, if the Court please.

(Testimony of Robert E. Hughes.)

The Court: All right.

Mr. Belli: Q. Did you mention it to Mr. Krakauer? A. No, sir, we did not.

Q. Did Mr. Krakauer have charge of that book?

A. Yes, sir.

Q. And was that book locked up any place?

A. It was locked up in his bottom drawer.

Q. That is the last place you saw it?

A. Yes, sir.

Q. Now, with reference to Julius being in hock, do you know anything about him going to—was it Maxferd's, or Manford's? A. Maxferd's.

Q. Do you know anything about that of your own knowledge? A. Only that I— [275]

Q. Let me stop you just a moment.

Maybe for the sake of time, counsel, do you have a record of his visits to the other uncle, Maxferd?

Mr. Campbell: The Maxferd man is on subpoena to come back. We can bring him back if you wish.

Mr. Belli: I mean, in order to show the transaction.

Mr. Campbell: Yes, to show the loans to Maxferd, and the repayment, yes.

Mr. Belli: Then it won't be necessary to go through it with him.

A. As far as I am concerned, if I may say—?

Mr. Campbell: I doubt if he is competent to testify.

The Witness: I wouldn't be competent, outside of what Mr. Wild told me, by hearsay.

Mr. Belli: All right.

Q. How about anybody else? Was he borrow-

(Testimony of Robert E. Hughes.)

ing from anybody else during this period of '41, '42, and '43? A. Only by hearsay, sir.

Q. Well, could you give us even the names, in hearsay, and we won't take it for substantive value, but as a point to check from?

Mr. Campbell: I will object, if the Court please.

The Court: Sustained.

Mr. Belli: All right.

You may cross examine. [276]

Mr. Campbell: Pardon me.

Cross Examination

Mr. Campbell: Q. Mr. Hughes, when did you first go to work for Mr. Wild?

A. About approximately 1931.

Q. And you worked for him there until when?

A. As long as the book was open, until about 1943.

Q. When, in 1943?

A. Well, the exact date I do not know, and the only time, the only way I could have established it is when my handwriting stopped on those tickets (indicating).

Q. Well, can you establish it?

A. Yes, sir; in May, 1943.

Q. I will give you the three sets of cards, particularly the last set for the year 1943 (handing cards to the witness), and I will ask you if you can establish the date?

A. According to the last time here, the only way I can check it—because I do not keep records

(Testimony of Robert E. Hughes.)

on times I went to work, unless they are approximate dates—would be on the 5th month and the 15th day of 1943.

Q. That will be May 15, 1943?

A. That's right.

Q. Those are the last entries you made?

A. That is the last entries, as far as I know, that I have made. [277]

Q. And to the best of your recollection it would be immediately after that that you left, is that correct?

A. That's right.

Q. Now, you say with reference to these sleepers, that the record of those, and the sleepers themselves, were kept by Mr. Krakauer?

A. That's right.

Q. And you have described some instance in 1941—June or July you said?

A. That's right.

Q. When you and Mr. Koster put in a sleeper that you didn't hear from again, is that right?

A. That's right.

Q. And Mr. Krakauer continued to handle those sleepers right up until the time you left, did he?

A. That's right.

Q. Never any interruption of his taking care of those sleepers?

A. That's right.

Q. Now, Mr. Hughes, there has been some reference as to this being two rooms there, a phone room and another room. Were there more than one room there?

A. Yes, sir.

Q. A front room and a back room?

(Testimony of Robert E. Hughes.)

A. That's right, sir. [278]

Q. The back room was an office?

A. It was, previous to that time, what we called a "Women's Room," and an arch was put in, a small arch was put in from the main, big room to the small room in back.

Q. There for awhile you operated a room for women bettors, did you? A. Yes, sir.

Q. That was exclusively for their use?

A. That's right, sir.

Q. Over what period of time did you have this lady's parlor or women's room, whatever you want to call it?

A. Oh, that was before, I would say, 1936, if I remember rightly, because that is when the, as we call it, "big heat" was on, and the Atherton investigation was started.

Q. And during the Atherton investigation I take it you closed up your lady's room?

A. Tight as a drum.

Q. And didn't reopen that part of the business?

A. Didn't open any part.

Q. Well, when you reopened after that you abandoned the women's room?

A. That's right.

Q. And when did you start to operate again after that?

A. I couldn't tell you, sir. I don't know any dates at all. I never kept any records. [279]

Q. How long were you closed up?

A. A year and a half.

(Testimony of Robert E. Hughes.)

Q. That was back about '36, '37?

A. The dates I couldn't tell you, sir.

Q. Well, that was, at any rate, during the Atherton investigation? A. That's right.

Q. Is that right? A. That's right, sir.

Q. Then you reopened after that?

A. Yes, sir.

Q. And you continuously operated, with small interruptions, I presume, right up until the time you left the employment?

A. That's right, sir.

Q. And it is a fact, is it not, that you closed for two months in 1941, as shown by these cards?

A. That I couldn't tell you, sir.

Q. And that may—

A. If that has been determined, why, it is the truth. But I did not keep any records of any time we were closed.

Q. Do you recall that you were having trouble with some sergeant in the precinct, and he wouldn't let you operate?

A. That I couldn't tell you, sir.

Q. All right. You do recall this: Occasionally you would be closed for a few days, is that right?

A. That's right, sir.

Q. And then you would reopen your business?

A. That's right, sir.

Q. And during all the years in question you operated in one location—1182 Market Street?

A. No, sir.

Q. You did not? A. No, sir.

(Testimony of Robert E. Hughes.)

Q. Where did you operate?

A. Halfway down the block.

Q. In the same building?

A. No, sir; in another building.

Q. What other building did you operate in?

A. I don't know that.

Mr. Belli: Well, isn't this going into something else we are not concerned with in this case?

Mr. Campbell: Well, I am going into his familiarity with the business. He has exhibited great familiarity with Mr. Wild's affairs.

Mr. Belli: I will withdraw the objection if that is counsel's purpose.

The Witness: I don't know the name of the building, and I don't know the address. I can find out for you, but I don't know the name of it.

Mr. Campbell: Q. Now, Mr. Hughes, you have identified [281] and picked out for purposes of identification the first card in Government's Exhibit 7, the group of cards relative to 1941. Now, that is the one you were shown on direct examination and the one from which you have testified, wasn't it?

A. Yes, sir.

Q. And you stated, I believe, that on the reverse side of the card—whether you call it the front or the reverse—where the expenses are listed—do you have that in front of you? A. Yes, sir.

Q. That lettering, "EXT," and the "\$30.00," is your writing? A. That's right, sir.

Q. What does that "EXT" stand for?

A. "Extras."

(Testimony of Robert E. Hughes.)

Q. What extras? What does it refer to?

A. We were given a bonus that day.

Q. And that was a bonus that you and the employees received?

A. That's right, sir.

Q. So it was entered on that day, is that right?

A. Yes, sir.

Q. Then you have "Rent, \$117.50," is that right?

A. Yes, sir.

Q. The next item is "Nut, \$105.00." What is that, sir?

A. That is an item that, as long as I ever worked for Julius, that I never showed no interest, and showed no inclination to [282] find out what it was.

Q. Well, now, you wrote this word "Nut" down there?

A. That's right.

Q. You paid that money out on that occasion?

A. No, sir.

Q. Where did you get the information to write "Nut, \$105.00"?

A. From Mr. Wild.

Q. He told you to write "Nut" there?

A. That is what it was called, so that is what was put down.

Q. And he told you that?

A. After all, this is in 1941, and what he told me I could not tell you at this time, sir.

Q. Well, you remember other details of this business.

Mr. Belli: Just a moment.

That is argumentative, your Honor.

Mr. Campbell: All right.

(Testimony of Robert E. Hughes.)

Q. You recall details here of transactions had of which there are no records presently available.

A. That's right.

Mr. Belli: Just a moment.

We object to that. What transactions? Let's have it specifically, and we will lay the foundation whether he remembers that or not. That is an argumentative question.

The Court: It may be.

Do you wish to withdraw it? [283]

Mr. Campbell: I will reframe it.

Q. You remember details here concerning such matters as transactions with No. 1—Operator No. 1?

A. That's right.

Q. Now, you said that records as to that had disappeared. I am referring you now to a record which you state that you made, an existing record, and referring to the word "Nut"; I will ask you, as long as you made that entry, who authorized you to make it?

A. Mr. Wild authorized me to make that?

Q. What did he tell you when he told you to make it?

A. "Put down 'Nut, \$105.00'."

Q. Did he tell you on that occasion what it was for?

A. I never asked him. I never asked anything on any of the things that were supposed to be put down here. I was not the bookkeeper. All I did was take care of his business in the room itself, and helped him take care of his business in the back room.

(Testimony of Robert E. Hughes.)

Q. But this item you never asked about?

A. I never did.

Q. You had no curiosity as to what the word "Nut", which you were instructed to put down, meant?

Mr. Belli: I think that is argumentative, your Honor, as to whether it was curiosity, or the converse of that. I think it is of no moment here. [284]

The Court: Well, proceed, counsel.

Mr. Campbell: Q. Did you put down similar items, or—strike that.

There was a card, was there not, kept for each day? Is that right? Each day you would get a new card, wouldn't you? A. That's right, sir.

Q. And you would make entries for the day of the amounts that were bet there, is that right?

A. The total take, pay-out, and expenses, yes, sir.

Q. Yes. And they would be accumulated, would they not, on the following day's card?

A. That I don't know, sir. I never took care of that. And in fact, these cards, if you want to know, were against my policy.

Q. Well, I am not interested in your policy, Mr. Hughes.

A. And if I had had my say, these cards would not have been ever drawn up.

Q. I appreciate that, sir. Now, nevertheless, the cards are here. A. That's right.

Q. Yes, sir. And you made entries on the cards during the time you were there?

(Testimony of Robert E. Hughes.)

A. Because I was so ordered to do so.

Q. And you made entries daily while you were there of the [285] expenses?

A. That's right, sir.

Q. On how many occasions did you make entries similar to this "Nut, \$105.00"?

A. I don't know exactly what you mean.

Q. How many times? How often would you make an entry of "Nut, \$105.00," as part of your daily expense?

A. Whenever I was told to do it.

Q. How often were you told that?

A. That part was determined by Mr. Wild.
Do you have any recollection as to how often you put it down? A. No, sir.

Q. You were told from time to time to put down \$105.00? A. That's right, sir.

Q. And it was always that sum, \$105.00?

A. That part you couldn't question me, because I never noticed whether it is that sum down there or not. If that sum is the sum that was to be put down there all the time, yes.

Q. Did you ever, in making entries on these

Q. Was it once a month?

A. If he told me to put it down once a month, yes.

Q. Well, what is your recollection now, sir?

A. If he told me to put it down once a month, I did so.

Q. Well, did you put it down once a month?

(Testimony of Robert E. Hughes.)

cards of the daily [286] expenses, use the symbol "X", or "XX"?

A. I would have to look at the cards to see what the figure is opposite, and then I could tell you.

Q. Pardon me. Let's turn to one of these cards in '41. You were working there full time in '41, as I understand it?

A. Up until December 7th.

Q. Until December 7th or December 8th?

A. Either that, or we were closed.

Q. I am going to refer you to Card No. 9, being for the period 3/1/41. I call your attention to the "X, \$105.00." Do you know what that is (indicating)?

A. Well, on that card, I wouldn't know, because it doesn't happen to be in my handwriting; it happens to be in Mr. Krakauer's handwriting.

Q. Anything that isn't here in your handwriting you know nothing about?

A. If it was put down there how would I know it was down there if it wasn't in my handwriting? I wouldn't be interested in it.

Q. Well, let me ask you this: Did you know anything about any of the entries made there, or in connection with that business, that were not in your handwriting?

A. No, sir, not all the time, no.

Q. You did not? A. No. [287]

Q. You didn't keep this little black book and make the entries in that, did you?

(Testimony of Robert E. Hughes.)

A. Not in completeness, no, sir. When I was told to put the entries in there, I put it in there.

Q. And did you have any information as to what those entries represented?

A. Yes, because I had helped Mr. Wild check on both against the book, against the room.

Q. You would ask about those entries?

A. When I helped him figure them out, yes.

Q. Do you recall ever having made entries on these cards of "X", or "XX"?

A. No, sir, I don't. I may have done it, but I couldn't tell you if I did or not, sir.

Q. You do recall making entries of "Nut", however?

A. Yes. Well, it is in my handwriting there, so I must have made it, sir. After all, that is seven, eight years ago, and I don't remember what was on those cards every month and every day that the entries were put in there.

Q. Now, you don't know what that was paid for?

A. I might hazard a guess, but I don't see why I have to.

Q. No. I am asking you if you know. I grant that you don't have to make a guess. Do you know?

Mr. Belli: Well, then, if counsel will be that charitable, your Honor, and say that he doesn't have to, I see [288] that there is a reluctance on the part of the witness to say what he thinks it is for.

Mr. Campbell: I am not entitled to know what he thinks. I didn't ask him what he thinks; I asked him what he knows.

(Testimony of Robert E. Hughes.)

Q. Do you know?

A. No. I think that if you will—

Mr. Belli: Just a moment, now. The more you say the more you are going to get asked.

The Witness: No. All I was going to mention, that he asked me that same question in that statement, and I told him at that time I don't know what it was. That was taken on March 26th.

Mr. Campbell: Q. Didn't you tell me, Mr. Hughes, that you would not state what it was for?

A. That's right; I said I didn't know.

Q. Well, didn't you say, "I will not tell anyone what it is for"?

A. I may have. That is still in 1946 when that was made.

Q. But isn't that what you told me, "I will not tell what that was for"?

A. Is that what it says in the book?

Mr. Belli: Just a moment.

Isn't the proper way to do this, as I understand it, if there were a former statement made by the witness, in all [289] fairness, shouldn't it be shown to him?

The Court: The witness claims complete familiarity with that statement, of recent date. He stated he had read it.

Mr. Belli: Yes, that he had read it, but—

The Court: And a copy was handed to him. He claimed full familiarity with it.

Mr. Belli: I have asked for it and have been unable to get it.

(Testimony of Robert E. Hughes.)

The Court: I am sure counsel will hand it to you.

Mr. Campbell: I have had it marked for identification.

Mr. Belli: It has been on your table.

Counsel wouldn't give it to me just a moment ago.

Mr. McMillan: Counsel, that isn't correct. I wanted to use it, and I said I would give it to you in a minute.

The Court: Now, counsel—counsel have been getting along very well on both sides.

Mr. Belli: May I have the copy now?

Mr. Campbell: Q. Mr. Hughes, do you have a copy of this statement? A. At home, yes, sir.

Q. It was furnished to you at the time you gave this statement?

A. Yes, sir — I don't remember when it was given to me, but it was given to me.

Mr. Campbell: The record will show this copy of the [290] statement was marked 14 for identification and will be left with the Clerk. I am using it at this time for the purpose of examination.

Mr. Belli: I still would like to see it, your Honor.

The Court: Q. Mr. Hughes, after you made the statement did you discuss the matter with Mr. Wild, or did you show him a copy of the statement you made?

A. No, sir; nobody has ever seen that. Not even Mr. Belli has ever seen that.

(Testimony of Robert E. Hughes.)

The Court: Well, for a 4:30 o'clock recess, we are reaching a point—

You may make a copy of it, or cause a copy to be made.

Mr. Campbell: I informed Mr. Belli that I would see if there was a copy available, and that I would furnish it to him. I don't know why we have this discussion at this time.

Mr. Belli: Well, if I get the copy that is all I want, as far as I am concerned.

The Court: All right, proceed.

Mr. Campbell: I thought your Honor said we would take a recess.

The Court: No; proceed. These interchanges take time. They serve no useful purpose.

Mr. Campbell: Q. Now, coming back to this black book— A. Yes, sir.

Q. (continuing) —where was that black book maintained in [291] the premises?

A. In Mr. Wild's desk in a drawer.

Q. That was a locked desk, was it?

A. No, sir.

Q. When did you last see it there?

A. I would say in the early part of 1941.

Q. That is the last time you ever saw it?

A. That's right, sir.

Q. When you say that it disappeared—

A. You said we wouldn't use that word.

The Court: No. "Mysteriously disappeared."

The Witness: Oh.

(Testimony of Robert E. Hughes.)

Mr. Campbell: You said "mysteriously disappeared."

The Witness: All right.

Mr. Campbell: That is entirely hearsay with you, is it not?

Q. You have no knowledge of what has happened to it, have you? A. No, sir.

Q. You don't know who has it today, do you?

A. No, sir.

Q. You don't know whether or not Mr. Wild has it? A. No, sir.

Q. Now, you say you made entries in that book?

A. Yes, sir.

Q. And you observed the book there in 1941?

A. Yes, sir.

Q. All right. When did you last see it in 1941?

A. I told you in the early part of 1941; just exactly when I couldn't tell you, sir.

Q. Would it be prior to the summer months?

A. It would be, just shortly prior to that, sir.

Q. And then in the spring of 1941?

A. Yes, sir.

Q. All right. And you have not seen it since then? A. No, sir.

Q. So that you have no knowledge of what entries, if any, were made in that book after the spring of 1941? A. That's right, sir.

Q. Now, at the time that you observed the book, what was the nature of the entries that you made in it? What did they relate to?

A. A figure was placed in there, one figure only, and it was underlined either in red or blue.

(Testimony of Robert E. Hughes.)

The figure amounted to the play, the gain, in the room, plus or minus, or vice versa, of the gain in the back room.

Q. In other words, according to your testimony, it was the sum of the gains from what you call the front room, together with the back room?

A. That's right, sir.

Q. And if one was a loss and the other a profit, one would [293] be divided from the other, is that correct?

A. Subtracted, yes.

Q. And over what period of time up until the spring of '41 that you last saw this book, what period did the book purport to cover?

A. It covered from the time I was there, in 1931, until that time. Mr. Wild always kept a book of that respect.

Q. All right. But after the spring of 1941 you no longer made any entries in it?

A. No, sir.

Q. And you never saw it after that?

A. No, sir.

Q. All right. Now, you say that back room business was done by runners?

A. That's right, sir.

Q. Your business, I take it, with the runners, also terminated in the spring of '41, is that right?

A. No, sir, they did not.

Q. Well, you still accepted the sheets they brought in? I am talking about you, personally, your personal transactions.

A. No, sir, unless Mr. Wild was not there, I did not handle any of their bets.

(Testimony of Robert E. Hughes.)

Q. You mean when he was there you did not handle it, is that right?

A. When he was or when he was not. I handled none of their [294] bets.

Q. In other words, you had nothing to do with the runner business?

A. Of accepting the bets. I put the bets down as Mr. Wild accepted them, and saw that they were taken care of, that they were followed through; that when the bets won, that the bets was marked in there, how much the man won, how much the man had coming.

Q. That was done right along with the regular business, wasn't it?

A. Of the back room business, yes, sir.

Q. Was that kept in a separate place from the front room business?

A. Oh, naturally. The front room business was all done on small cards the size of those (indicating). The back room business was done on large sheets of paper.

Q. Would you figure the pay-offs in the front room, then go to the back room and figure the pay-offs there?

A. That's right, sir.

Q. And between each race?

A. That's right, sir.

Q. And would you handle the cash to make the pay-outs?

A. No, sir.

Q. Who handled that?

A. A Mr. Collard did. [295]

(Testimony of Robert E. Hughes.)

Q. That was nothing whatsoever to do with the cashier's office, the cashier's cage in the front office?

A. Oh, wait now, pardon me. I misunderstood your question. I thought you were talking about the front room.

Q. I am talking about these runner's bets you were speaking of.

A. Mr. Wild paid them out of his own pocket.

Q. Now, who were these runners?

A. I told you, they came and they went. Sometimes they were different fellows.

Q. What were the names that you could give as of '41?

A. Well, it is going to sound funny, but the only two I could remember the names was one fellow named Yama, and another fellow was a fellow we called "Shufflin' Sam," because that is the way he walked.

Q. Yama—how do you spell that?

A. Y-a-m-a. I think you would find it in the newspapers. He was killed in a stabbing affray several years ago down on Ellis Street.

Q. And what happened to Shufflin' Sam?

A. He is still around.

Mr. Campbell: I see.

Mr. Belli: We have a subpoena out for him.

Mr. Campbell: Q. Do you know his true name?

A. No, sir, I don't. [296]

Q. How did these men who were coming in

(Testimony of Robert E. Hughes.)

there at the rate of eight or ten a day from certain bookmaking places, you can only remember two names? A. That's right.

Q. And you only know the last name of one of the individuals?

A. That's right. You know, if you have ever been in a bookmaking establishment, any person that is here, they will quite reasonably understand—even being that you are so amused about it, about these runners—and you will see that these runners came in the room, and they had this money, and they laid it down there and bet. There was quite a few of them that, when they collected a bet, they just kept right on going, and the fellow that originally made the bet was out of his money. And it was awfully hard to get a very reliable runner. But that was one of the risks that they took.

Q. Let me ask you this: When you say “runners”, were they representatives of other bookmakers, or were they people accepting bets on the street?

A. No, sir; they were representatives of big bettors and commissions from the East.

Q. Well, now, let's see if we can check that out, Mr. Hughes. A. Very easily.

Q. Who did these runners represent? What other bookmakers did they represent?

A. The Greenwald Club and the Kingston Club.

Q. Just the two?

A. In the Greenwald Club there may have been—I know of at least eight persons that operated in that.

(Testimony of Robert E. Hughes.)

Q. What is that, a kind of syndicate?

A. That's right.

Q. And that was one of the places that you were taking bets from, is that right?

A. That's right.

Q. And just those two that you have named?

A. Well, amongst them.

Q. I mean, those two places, those two clubs?

A. That was the two largest in San Francisco at the time, yes, sir.

Q. And among the two of them, they would hire as many as ten runners a day?

A. They would hire as many as 50 runners a day.

Q. As many as ten of those would come into your place? A. That's right.

Q. And these were cash transactions?

A. Absolutely.

Q. And you were handling them?

A. Between myself and Mr. Wild we handled them, and when Mr. Wild was not there I did not handle any of the runners myself, runners' business.

Q. But you never saw a record that was maintained after the [298] spring of 1941 respecting that business? A. No.

Q. So you don't know of your own knowledge whether or not that business was running at a loss or a profit, other than what you may have been told, isn't that right?

A. I would say, "Yes," but if you wanted to put me down to a specific figure of about how

(Testimony of Robert E. Hughes.)

much of the profit and loss, how much it might be, I would say "No."

Q. I see.

The Court: I think we have reached a convenient hour, although we ran half an hour late.

Mr. Campbell: Very well, your Honor.

The Court: Ladies and gentlemen of the jury, as I announced to you earlier in the afternoon, we will stand in recess and adjourn this case until tomorrow afternoon at two o'clock by reason of the fact, as I announced to you, of the services for the late Senior Circuit Judge Francis Garrecht, which will take place tomorrow morning. So we all understand it now, tomorrow afternoon at two o'clock. The jurors are to return to the court then.

However, the Court will take up the matter tomorrow morning at 11:30, of some criminal matters.

We will now stand in recess.

(Whereupon an adjournment was taken until Friday, August 13, 1948, at 2:00 o'clock p.m.) [299]

Afternoon Session, Friday, August 13, 1948, 2:00

The Clerk: United States of America v. Julius Wild, for further trial.

Mr. Campbell: Ready.

Mr. Belli: We are ready, your Honor. I think Mr. Hughes was on the stand. May I have him resume?

ROBERT HUGHES,

was recalled to the stand; previously sworn.

Mr. Campbell: Shall I proceed, your Honor?

The Court: Yes.

Cross Examination—(Resumed)

Mr. Campbell: Q. Mr. Hughes, coming back to the period of time during which you were employed by Mr. Wild, during 1941, '42 and '43, let us see if we can definitely establish the periods of time that you were working in the bookmaking establishment during that time. I believe you previously testified that your employment terminated approximately May 15, 1943. That is correct, is it not? A. That's correct.

Q. You stated you were full time up until Pearl Harbor, or December 7, 1941, is that correct?

A. That's correct.

Q. You were working six days a week there during that period of time, 1941? [300]

A. That's right.

Q. And approximately eight hours a day, I presume? A. That's right.

Q. After December 7, 1941, and up until the termination of your employment on May 15, 1943, what hours did you work, and what days?

A. On December 8 I was in the State Guard. I think I previously mentioned that, and I was called out on active duty for a period of about 15 to 30 days when I was on the Golden Gate Bridge all the time.

Q. That was 24 hours a day?

(Testimony of Robert E. Hughes.)

A. That's right, sir.

Q. Yes.

A. Then later on we were assigned to a period of approximately 12 hours a day from 12:00 noon until 12:00 midnight, and the detail was divided into several groups and I was able to arrange to work in the morning up until the time that I was called on guard duty.

Q. How long was that, your duty on the 12 hour shift on the bridge? A. Four hours.

Q. I mean, how many days, weeks or months would that continue?

A. That continued until about March, or the beginning of April.

Q. 1942? [301] A. That's right.

Q. During that period, then, for the first 15 to 30 days after Pearl Harbor you were not employed in "the room" at all?

A. I was not employed, but I was being paid.

Q. What I mean to say, you were not in "the room" at all during the day or had anything to do with the business? A. No, sir.

Q. Then after that up until March or April of 1942 you were on guard duty from 12:00 noon until 12:00 midnight, but in the morning hours prior to 12:00 o'clock noon you would do some work at 1182 Market Street? A. That's right.

Q. What hours did you report there on those days?

A. Where, at the book or at the guard duty?

(Testimony of Robert E. Hughes.)

Q. At the book.

A. 9:00 in the morning.

Q. When we use the term "book" we are referring to the establishment itself, are we not?

A. Yes.

Q. The establishment is known as the book?

A. That is right.

Q. You worked there from 9:00 until about when—11:30?

A. No, about 2:30 or 3:00 o'clock.

Q. I understood you to say you went on guard duty at 12:00 o'clock. [302]

A. I also stated I was able to arrange that I wouldn't have to be there until around 4:00 o'clock.

Q. And you would remain there from 4:00 o'clock in the afternoon until 12:00 midnight, is that right?

A. That's right.

Q. Then, after March or April, during the period you have described, what was your employment with Mr. Wild?

A. What periods? From there until about—the only way I can determine it is when my writing disappeared on those cards.

Q. May 15, 1943?

A. That's right, sir.

Q. What hours of the day did you work then during that period?

A. I went to work over at the United States Naval Air Base on October 2, 1942, if I remember rightly.

(Testimony of Robert E. Hughes.)

Q. Let us take the period from April 1942 up until the time you went to work at the Naval Air Base.

A. That's right.

Q. What was your employment then other than with Mr. Wild?

A. Nothing, only with Mr. Wild.

Q. You had no guard duties to perform during that period of time?

A. No, sir.

Q. You were at Mr. Wild's establishment every day, then, is that right?

A. Yes. [303]

Q. You were working on a full time basis?

A. Yes, sir.

Q. In October of 1942 you were employed at the Naval Air Base, is that right?

A. From 12:00 midnight until 8:00 o'clock in the morning.

Q. During that period of time and up until May 15 were you also working in Mr. Wild's place?

A. Yes, sir.

Q. What hours?

A. 9:00 o'clock in the morning until I just couldn't go any further, which would amount to, from anywhere from 11:00 o'clock to maybe 3:00 o'clock, and I would go home to sleep—9:00 o'clock in the morning until about 3:00 o'clock in the afternoon.

Q. And that continued up until May 15, 1943?

A. That's right.

Q. Or approximately then when you terminated your employment altogether with Mr. Wild?

A. That's right, sir.

(Testimony of Robert E. Hughes.)

Q. As I understand, during this period of time, and that is to say up until May 15 of 1943 and I am referring in my questions, unless otherwise indicated, to 1941, 1942 and up until you left in 1943, you stated you were in charge of the room play, is that correct? A. That's right, sir.

Q. You also stated that you assisted Mr. Wild in the play which you have described as the back room play from runners, is that right?

A. That's right, sir.

Q. But that when Mr. Wild was absent none of that runner play was accepted, is that right?

A. No, sir.

Q. What's that? A. That's right, sir.

Q. So that any time this play that you have described, the bets brought in by these runners, the so-called smart money, that you have referred to, Mr. Wild was always present when they were accepted? A. That's right.

Q. You never accepted those when he was absent? A. No, sir.

Q. And it is a fact, is it not, that Mr. Wild was present daily at that business establishment?

A. I would say almost daily, sir.

Q. And he ran that part of the business?

A. Yes, sir.

Q. You say that some record of that was kept, to your knowledge, up until the spring of 1941, is that right, the little black book you referred to?

A. I would say it was kept up until the spring of 1943. [305]

(Testimony of Robert E. Hughes.)

Q. Now, you stated yesterday that you had not seen this black book after the spring of 1941. Was some other book kept then?

A. Not that I know of.

Q. Well, you never saw the black book record after the spring of 1941? A. No, sir.

Q. So, of your knowledge, I asked you, or let me put it this way: Did you ever see any record kept, any written record, kept of that business you have described as the runner business or back room business after the spring of 1941?

A. Only what was put down on the daily run-down tape and was put into his pocket.

Q. And you don't know what happened to those? A. No, sir.

Q. You don't know whether that was transferred to any book or whether the tape was kept?

A. No.

Q. I also understood your testimony that on several occasions in 1941 you went with the defendant Wild to Caliente or Tijuana, is that correct? A. Yes, sir.

Q. Did the occasions you went there with him all fall in the year 1941?

A. That I could not be sure of.

Q. Did you go with him on any occasions in 1942? [306] A. No.

Q. Did you go on any occasions in 1943?

A. No.

Q. You did, however, go on certain occasions in 1941? A. Yes, sir.

(Testimony of Robert E. Hughes.)

Q. And possibly in prior years, I take it?

A. Yes, sir.

Q. In 1941 on how many occasions did you go there with him?

A. I don't know; I never kept track of them.

Q. Your best estimate, sir.

A. That could not be estimated, sir, as far as I am concerned. I didn't keep all those things.

Mr. Belli: Speak a little louder, please.

The Witness: Yes.

Mr. Campbell: Q. Can you state definitely that in 1941 you went to Tijuana or Agua Caliente on more than two occasions with him?

A. I could not, sir.

Q. Could you state whether you went on one occasion definitely in that year?

A. I could not, sir.

Q. All right. Now, you referred in your testimony yesterday to the laying off of bets which were accepted at the rooms and you referred particularly to this, what you called the smart money or runner money, and you referred to layoff places at [307] Bay Meadows and Tanforan. Was Tanforan running in 1941, do you know? Did they have a meeting there?

A. That I couldn't be positive of.

Q. Did they have a meeting, do you know, in 1942?

A. No, I don't think they did. I think that the war took it over then.

Q. And they did not run in '43 either, did they?

(Testimony of Robert E. Hughes.)

A. No, sir.

Q. Was there a meeting at Bay Meadows in 1941? A. I would say yes.

Q. There was in 1942 as well?

A. I don't remember, sir.

Q. You don't recall whether there was or was not? A. Whether there was or not.

Q. And was there a meeting there in 1943, sir?

A. I don't remember, sir.

Q. You don't recall that? A. No, sir.

Q. But you have a recollection that there was a meeting at Bay Meadows at least in 1941?

A. Yes, sir.

Q. Now, you refer to the fact that there were layoff rooms at Bay Meadows where these bets were handled. Will you explain what a layoff room is or where the layoff room is at Bay Meadows?

A. The layoff bet at Bay Meadows was usually run by a man who had a—I never was in the room, but it was explained to me and I have called him up several times, and he had phones in this room across the highway, across the 101 Highway at some spot down there, and any bets that wanted to be telegraphed down or sent in to him were sent down and he would in turn take the money and go over and bet it in the mutuel machines.

Q. Let's get this straight. Who was this individual? A. Jack Kyne.

Q. Jack Kyne? A. Yes.

Q. And he was the person that was used by your book for that purpose?

(Testimony of Robert E. Hughes.)

A. That's right, sir.

Q. When would you phone down to him with reference to a particular race?

A. You had to phone to him—

Q. Say, a race with a post time of 2:10, what time would you have to phone down to him?

A. You would have to phone down at least a half hour ahead of time.

Q. And what would you do with the layoff bets that you received less than a half hour before post time?

A. We would not take them if we could help it.

Q. You wouldn't take any bets in any time less than a half hour [309] before post time?

A. Not big bets—small bets in the room we took up until exactly post time.

Q. But this so-called smart money or big bets you would not take after you had an opportunity to lay it off? A. That's right.

Q. Did you have any arrangement which guaranteed that your money would be laid off down there with this Jack Kyne you have referred to? In other words, what guarantee did you have that he would get up to any mutuel window in time to place your bets?

A. No guarantee. The man was a bookmaker and when you made a bet with a bookmaker it was the same as in the room. There was no guarantee you would get paid off in the room, but you made

(Testimony of Robert E. Hughes.)

a bet and expected to be paid off by the man, and if he didn't pay off he would not be in business.

Q. I take it when you referred in your testimony yesterday to the layoff place at Bay Meadows you were not referring to any enclosure within the track itself? A. That's right, sir.

Q. Now, you were shown yesterday these cards with reference to 1941 and 1942, and drawing your attention up until May 15 of 1943, which were the last ones on which your handwriting appears, do I understand you that you have no knowledge of what was contained in the figures on the bottom of these cards in [310] ink, showing you Government Exhibit 7, and I call your attention to the face of these cards, the figures that appear in ink that you testified, I believe, were made by Mr. Krakauer? A. That's right, sir.

Q. You have no knowledge of these figures?

A. I never saw these figures until the first time I was asked about it in the Bureau of Internal Revenue.

Q. Did you have any knowledge of your own, then, of what is set forth in these figures or contained in the figures or the totals which are set forth there?

A. Only to the extent that I was asked what they were supposed to be and I tried to make a guess for you folks; in fact, when I was asked about it—

Q. I am asking you now if you, of your own

(Testimony of Robert E. Hughes.)

knowledge, know what is represented in these figures at the bottom of these cards?

A. No, I am not a bookkeeper. I don't know how he carried those cards.

Q. And do you know what figures went into the totals of these cards? A. Pardon me?

Q. Do you know what figures went in these cards to make up the totals? Take this one, for example, of \$11,926. A. No, sir.

Q. So you do not know of your own knowledge whether or not the [311] telephone bets were recorded on the bottom part of these cards, do you?

A. No, sir.

Q. And you don't know whether or not the runner bets were recorded on these cards, do you?

A. No, sir.

Q. I believe you stated yesterday with reference to this first card that the word "Ext." represented the bonus which was paid to the employees on that day, and that is the first week of January 1941? A. Yes, sir.

Q. How much was paid to each employee?

A. I don't know, sir.

Q. How much did you receive, sir?

A. I don't know.

Q. It was an entry which you made, however?

A. Yes, sir.

Q. Isn't it a fact that, or is it a fact, that you only received a bonus when the profit ran over \$100 a day? A. Ordinarily, yes.

Q. I call your attention to the fact on this card that the profit shown is that of \$43 and I ask you

(Testimony of Robert E. Hughes.)

if it is not a fact that "Ext." stands for something other than bonus paid to employees?

A. No, it doesn't. [312]

Q. You are very positive that it refers to a bonus paid you employees and on that day?

A. Yes, sir.

Q. I call your attention to the second card of this group and to the figures appearing on the back under the "Expenses"—"XX—\$50"—do you know what that is?

A. That probably would be a bonus, sir.

Q. Is that your handwriting? A. Yes.

Q. You used "XX"—two cross marks on this?

A. That's right, sir.

Q. Did you on some occasion use "Ext." as a code for bonus? A. Yes, sir.

Q. And on some occasions you would use the double cross? A. That's right.

Q. Is your answer the same as to this sixth card with two X's and \$85?

A. I would say yes.

Q. That is your entry on there, isn't it?

A. Yes, sir.

Q. And your statement now is that XX means a bonus of \$85 that was paid to employees on that day?

A. I don't say it is absolutely, sir, but I say it is very probable that is the truth.

Q. I am asking for what is the truth; that is your best [313] recollection at this time?

A. That is my best recollection.

(Testimony of Robert E. Hughes.)

Q. How much did you receive on that occasion?

A. With that amount I would say double salary.

Q. Did you on occasion receive double salary?

A. Yes, sir.

Q. Let us take the eighth card on the list, the double X, and there is \$1. Is that a bonus paid to employees, a dollar split up among them? That is your writing, isn't it? A. Yes, sir.

Q. Do you wish to change your testimony as to the meaning of that double X?

A. No, I don't.

Q. That is a bonus? A. No, sir.

Q. What is that double X?

A. I do not know, sir.

Q. I call your attention to the word "nut"— "\$45." Is that your writing, sir?

A. Yes, sir.

Q. What is that? A. I don't know, sir.

Mr. Belli: That was gone into the other day, your Honor, was it not? I object to this as having been asked and answered and reasked and reanswered. [314]

The Court: Objection overruled.

Mr. Campbell: This is a different card.

Mr. Belli: But it is the same question as to the problem of pay-off which I understood we were not trying in this case.

The Court: Objection overruled.

Mr. Campbell: Q. I call your attention to the ninth card with a single cross and \$105. Is that your writing? A. No, sir.

(Testimony of Robert E. Hughes.)

Q. Do you know what that entry is?

A. No, sir.

Q. I call your attention to the 27th card of this group, all being from Government Exhibit 7, the card relative to 1941, the item of single X—\$20. Is that your writing? A. No, sir.

Q. Do you know what that single X, \$20 represents? A. No, sir.

Q. I call your attention to the 28th card, a single X—\$10. Is that your writing, sir?

A. No, sir.

Q. Do you know what that represents?

A. No, sir.

Q. I call your attention to the 29th card, again a double X—\$20. Is that your handwriting?

A. Yes.

Q. Do you know what that represents? [315]

A. No, sir, after all, my dear sir, how would I know after this little time just exactly what those figures would be?

Q. Well, you previously stated, Mr. Hughes, that the double X represented a bonus that was paid.

A. That's right, but the only way I could determine that, if they were bonuses or not, is whether the profit was over \$100 usually we would get a bonus. You are just showing me that one item and then taking it away. If you let me look on the back of the card and let me see if the profit is exceeding \$100 I can say, not definitely, but would say in all probability that is a bonus.

(Testimony of Robert E. Hughes.)

Q. All right. Let us take this next card, No. 32: I call your attention to the fact that there is a triple X item of \$85 and double X item of \$20, and I ask you as to those to state if they are in your writing and what they represent.

A. In this case there is a profit of \$158 on the day, but I would say that one of those items would definitely state that we got a bonus on that day. What the bonus was I couldn't tell you, sir, or the amount.

Q. Well, which is the bonus?

A. I don't know, sir.

Q. Do you recognize one of those symbols as representing a bonus?

A. No, sir, they are both marked with a cross, so it is all the same. [316]

Q. One is for \$85 and the other is for \$20, and the day's profit was \$158, is that right?

A. Yes.

Q. But you say one of those was bonus?

A. Yes.

Q. Let us take card No. 38: There is \$105 gain for the day, but the double X is for \$7. Will you explain that?

A. Right above it, not in my writing, it says, "X salary — \$48," so that would mean we got double salary that day.

Q. But there is a double X of \$7—what would that be? A. I don't now what that would be.

Q. You have examined these cards, haven't you?

A. Just as far as the handwriting of mine that

(Testimony of Robert E. Hughes.)

is on the back of the card and on the front of the card and that it was mine.

Q. Well, you have observed that there are various X's, a single X, a double X and triple X items on these cards under the "Expense" items.

A. Yes, sir, just from what you have showed me.

Q. Would your answer be the same as to all of those that you do not know what they represent unless they represent bonus?

A. That's right, sir.

Q. And where more than one of such items appears you do not know whether or not they represent profit or loss from this so-called phone business you have referred to, do you?

A. No, I don't. Well, that would not be up there, regardless [317] of where it is because that is the actual—as far as what was put on there, it shows the actual book expense, the outside room expense.

Q. That is an expense item of some kind, then; you do know that?

A. It was paid out from the book.

Q. I am trying to find out who it was paid to and for what purpose, Mr. Callahan.

A. My name is Hughes.

Q. I mean, Mr. Hughes. Pardon me, sir. I want to call your attention to just a few more of these cards and then I will leave the matter. I call your attention to card No. 38 for September 19, 1942, and double X and \$125. Is that your writing?

(Testimony of Robert E. Hughes.)

A. No, sir.

Q. Do you know what that is?

A. No, sir.

Q. And the card immediately preceding that, card No. 37 for the period ending September 12, 1942, "X Salary \$30"—that is a bonus item, is it not?

A. I would say so. It is not in my handwriting, but I would say that is what it was.

Q. And isn't it a fact when the bonuses were recorded on these the word "Salary" is used?

A. When Mr. Krakauer it seems to be, but when I wrote it, it did not. [318]

Q. And you say some of these X's and double X's were not written by you but were written by him, is that right? A. That's right, sir.

Q. Showing you this one of August 1, 1942, is that your "X" and the \$105?

A. That's right, sir.

Q. What was that, sir—that \$105?

A. I don't know, sir.

Q. You have no idea of what that item was?

A. No, sir.

Q. Was that an item you wrote at the direction of Mr. Wild?

A. I wouldn't know, sir. When I was told to put down there something, I did, but where the money went to or who got it I couldn't tell you from this date.

Q. Did you take instructions from anyone other

(Testimony of Robert E. Hughes.)

than Mr. Wild as to what to put down on these cards?

A. I put it down at my discretion, sir; if the money was to be paid out to newspapers or racing forms, or anything else, I did not have to ask Mr. Wild's permission on that account.

Q. You saw, of course, that the money was paid out?

A. I saw that the money was handed to the proper person to whom the money was to be delivered to.

Q. Who had you handed the \$105 to?

A. I couldn't tell you.

Q. Let us take this one of April 4, 1942, card No. 14 with [319] "X \$105". Are those your figures?

A. No, sir.

Q. Do you know what that "X" means?

A. No, sir.

Q. That was money that to your knowledge was taken out of the business?

A. Yes.

Q. Each of these items on the expense side was money taken out of the business, to your knowledge, is that right?

A. Yes, I would say that.

Q. But you would balance up the cash on the front side of this, would you not?

A. Yes, sir, with Mr. Krakauer.

Q. So that each time that these double X's or triple X's or single X appears as an expense item, to your knowledge that money was actually taken out of the drawer or till and used for some purpose?

A. That's right.

(Testimony of Robert E. Hughes.)

Q. And that, with your knowledge, was taken out of the room?

A. Yes, but if it was taken out of the room, naturally being responsible for the money, I wanted to know that it was written down on the card and that was the only reason.

Q. And being responsible for the money you made sure it went to Mr. Wild or to someone at his request, is that right? A. That's right.

Q. Now, you were asked yesterday about bank account. What bank accounts did he have in 1941?

A. The only two that I absolutely knew about was one at the Day and Night Branch, and I am not sure whether that was in 1941; but the other one was up at the American Trust at the Civic Center and it was kept there for one purpose only and that was so that we could get change.

Q. Was that Civic Center account opened during 1941? A. I don't know, sir.

Q. Didn't you say yesterday that you first learned of that account in 1942?

A. That I don't know, sir; I couldn't tell you the exact dates.

Q. You don't know now whether that was open in 1941 or not.

A. No, I am not absolutely positive.

Q. You had also a safety deposit box in connection with the business?

A. I never saw the safety deposit box.

Q. But you knew there was a safety deposit box in connection with the business?

(Testimony of Robert E. Hughes.)

A. I have heard there was such a thing, yes, sir.

Q. Where was that maintained?

A. At the Day and Night Branch of the Bank of America on Market Street.

Q. Did you have access to that safe deposit box? [321]

A. I never saw the box, or was never there.

Q. You were not authorized to go into that box? A. No, sir.

Q. And by authorization I mean authorized at the bank as one who could sign and enter.

A. Not so far as I know, sir. [321-A]

Mr. Campbell: Pardon me a moment. That is all.

Redirect Examination

Mr. Belli: Q. Do you know of your own knowledge whether Mr. Krakauer knew of the black book, or not?

Mr. Campbell: Objected to — Pardon me, I thought you were finished.

Mr. Belli: Yes, I did finish.

Mr. Campbell: I am going to object to that as his conclusion, as to Mr. Krakauer's knowledge.

The Court: Sustained.

Mr. Belli: Did your Honor rule?

The Court: I sustained the objection.

Mr. Belli: I believe I appended the question with the statement of his own knowledge, if he knew.

(Testimony of Robert E. Hughes.)

Mr. Campbell: I submit he wouldn't know what Mr. Krakauer knew.

Mr. Belli: Q. Did you ever see Mr. Krakauer around with a black book? A. No, sir.

Q. Did you ever discuss the black book with Mr. Krakauer?

Mr. Campbell: Well, now—

A. I do not think so, sir.

Mr. Belli: Q. Was the black book discussed with Mr. Wild and you or anyone in the presence of Mr. Krakauer??

A. No, sir, I do not think so.

Q. When you were called—withdraw that. Were you not [322] called by the Internal Revenue, by Mr. Burkett, after you gave one or two of these statements? A. Yes, sir.

Q. And were you then asked about the black book?

Mr. Campbell: Objected to—

A. Yes—

Mr. Campbell: Just a moment. That is objected to as immaterial. I think any discussion—I don't know what this would lead it, but any discussion he may have had with a revenue agent on these matters, we are going into very collateral matters. I have no objection to this particular question, but I think this type of testimony or this type of question can lead us far astray from the inquiry here.

Mr. Belli: I recall yesterday, your Honor, that the proffer of proof that was taken—

(Testimony of Robert E. Hughes.)

Mr. Campbell: I will withdraw my objection. I will withdraw my objection to this particular question.

Mr. Belli: Read the question, please.

The Court: You had a discussion with Mr. Burkett about a black book?

The Witness: Yes, he did ask me if I had ever seen the book, or knew of its whereabouts. I answered that I did. I not only seen the book, but had entered figures into the book and entered figures ever since I began to work for Mr. Wild, but where the book was, why, I did not know. [323]

Q. You have seen the black book, you said?

A. Yes, sir.

Q. Did you do some work in it, yourself?

A. My figures are in that, just like they are on the cards, sir.

Q. With reference to Julius' expenses there at the book, that are not in the card, here, did Julius have a free lunch or entertainment there?

A. Well, he always bought lunch for most of his employees. We were never allowed a lunch period, with only a few exceptions, and he always brought down Roquefort cheese and crackers and salads and coffee and everything else that the help wanted. Our work was continuous. I mean, from the time the races started until we were finished.

Q. Where was that paid from?

A. Usually from Julius' pocket.

Q. Did Julius have a jockey that he was keeping there at the book?

A. Yes, sir.

(Testimony of Robert E. Hughes.)

Q. Can you tell us about that, who paid the expense for him? A. Well, Julius did.

Q. Who was the jockey?

A. Well, Armando Fermin, the boy that rode most of his horses most of the time.

Q. Well, can you tell us why or how he kept him there at [324] the book?

A. Well, the boy did not get many mounts, but he rode for Julius, and naturally his fee from Julius and his horses wasn't enough to keep him going and it was only natural; later on when he got enough mounts to get by on, he finally left there.

Q. With reference to the business of these runners, now you have given us some indication of the business that was transacted by them and some concept of the size of it. In other words, for us to subpoena those runners, will you state for the record now, so that we will have it over the week end, just give the names; you can give us the last names, or if not, give us the first name or the nicknames of some of these runners that you knew.

A. Well, there was Shufflin' Sam.

Q. We had his the other day.

A. There was Yama.

Q. And we had his name the other day.

A. Rosie; that is the only name I ever knew him by. And the dishwasher used to come in there and bet.

Q. Who? A. The dishwasher.

Q. Is that the name he was known by?

(Testimony of Robert E. Hughes.)

A. That is all. He used to wash dishes when he went broke. He would wash dishes for a little while to get started again.

Q. All right, who else? [325]

A. Well—(hesitating)

Q. Was there someone called “Sacramento Butch” that came in there?

A. Sacramento Butch was a bookmaker that accepted Julius’ lay-offs. Another one was “Artichoke Joe.”

Q. Where did Artichoke Joe come from?

A. He originally came from San Bruno, and he eventually wound up down on Sixth Street.

Q. How about “Ten Grand Paddy”?

A. He was a big bettor that used to come in there and bet.

Q. How about Mr. “Q”?

Mr. Campbell: I am going to object that this is all leading and suggestive, if the Court please.

The Court: Well, it may be.

Mr. Campbell: We may be saving time, however, so—

Mr. Belli: That is the purpose of it.

Mr. Campbell: All right, go ahead.

Mr. Belli: I mean, I have been given a list of these rather romantic appellations and I thought it would be fastest to do it this way.

A. (Continuing): Mr. Q is also another bettor who flitted in and out.

Q. And that is the letter “Q”?

A. That’s right.

(Testimony of Robert E. Hughes.)

Q. And Willie Watso? [326]

A. Yes, he also bet.

Q. Now, are these characters, or these people, men who habituated the booking row of the street about at that time, and were well known in the community? A. That's right.

Q. Did they carry transactions by means of cashier's check, or personal check, or a money order, or cash?

A. Cash was always advisable in a bookmaker establishment or in a bookmaking game, just like down at a racetrack—you bet cash, not checks.

Q. The other day you remarked about these cards. I think that your expression was that you wished or suggested that he not keep—Julius not keep—these cards, and by “these cards” I refer to 9, 7, and 8, Government's Exhibits. Will you explain your answer, please?

A. Well, naturally, they don't reflect the true business that Julius handled down there.

Mr. Campbell: I ask that the answer be stricken. The witness had heretofore stated that he didn't know what was on those cards, if the Court please.

The Witness: Well, since I have looked at them—

Mr. Campbell: Just a moment, Mr. Hughes.

The Court: The answer may be stricken in its form, but the witness will be allowed to explain just what he has in mind, precisely, in the light of his former answer to Mr. [327] Campbell yesterday. You might address the question to him, an explanation of what he had in mind.

(Testimony of Robert E. Hughes.)

Mr. Belli: Yes.

Q. You say you made the statement the other day that you didn't want him to wished that he didn't, or something like that, about keeping these cards here. Now, you just gave us that flat statement that more or less is a conclusion. Will you explain your reason for that answer in detail?

A. Well, when you take on a daily card there of the amount that was put down there and was left on the top of the card where you subtracted your pay and your take, if the pad has a bad day, which it frequently did, why, that wouldn't be the true value, and if the figure is supposed to have been transferred down there and there is only marked in as far as the room play—as Mr. Krakauer has explain, himself—that this is only a room play business—

Mr. Campbell: Now, just a moment, I ask that that characterization, that Mr. Krakauer explained himself, be stricken.

The Court: All right.

A. (Continuing): So I am just saying that that is not a true value of the real play that was in the book.

Mr. Belli: Q. As far as Julius, himself, was concerned, in the running of the business, did you ever at any time see Julius do a dishonest thing in the booking business?

Mr. Campbell: Now, that is objected to, if the Court [328] please.

The Court: Sustained.

(Testimony of Robert E. Hughes.)

Mr. Belli: Q. Was there anything dishonest with reference to these sleepers?

Mr. Campbell: That is also objected to.

Mr. Belli: Q. By Julius—

Mr. Campbell: That is also objected to, your Honor.

The Court: Sustained. I think the subject-matter has been gone into very thoroughly.

Mr. Belli: All right. That is all, sir. Thank you.

Mr. Campbell: Just one or two questions.

Recross Examination

Mr. Campbell: Q. You stated, I believe, that there was a hocket expense in connection with Mr. Wild's stable.

A. Yes, sir.

Q. Fermin?

A. Yes, sir.

Q. Now, as a matter of fact, didn't Julius, after 1940, and sometime around or about July of 1940, dispose of any interest he had in horses and get out of racing?

A. No, sir.

Q. I am going to show you a document—

Mr. Belli: May I see it first, Counsel?

Mr. Campbell: Yes, I am going to identify it for the record. I ask that this be marked for identification. It is a [329] carbon copy of a letter on the stationery of the Hotel Whitcomb, San Francisco, dated and bearing the typewritten address, 1182 Market Street—July 1, 1941, and addressed to the Treasury Department, and bearing the typewritten signature “J. Wild, By——,” and with

(Testimony of Robert E. Hughes.)

the initials "RFC/C," to which is attached what purports to be an original letter from Mat Rogan, Collector, by W. R. Pearson, Cashier, on the letter-head of the Treasury Department, addressed to Mr. J. Wild, care of Hollywood Turf Club, and to which are attached copies of what purport to be employer's report of taxable wages paid to employees, dated 6/20/40, and ask that they be marked for identification.

The Clerk: Government's Exhibit 15 For Identification.

(Letters referred to were marked U. S. Exhibit 15 for Identification.)

(Exhibit 15 for Identification was then handed to Mr. Belli by Mr. Campbell.)

Mr. Belli: They are all as one exhibit?

Mr. Campbell: Yes, for Identification purposes.

Mr. Belli: We will stipulate they may go in.

Mr. Campbell: May go in evidence?

Mr. Belli: Yes.

Mr. Campbell: I will offer it in evidence then, if the Court please.

The Court: It may be marked Government's Exhibit next [330] in order.

The Clerk: Government's Exhibit 15 in evidence.

(Testimony of Robert E. Hughes.)

(U. S. Exhibit 15 for Identification was thereupon received in evidence.)

Mr. Campbell: Q. I am going to read you this letter, and ask you if this refreshes your recollection: (reading)

Hotel Whitcomb,
San Francisco,
At the Civic Center

1182 Market Street

July 1, 1941

Treasury Department,
Internal Revenue Service,
Los Angeles, California

Attn. W. R. Pearson, Cashier.

Sir:

Replying to your letter of June 25th, in regard to the payment of \$2 made in August, 1940, copy of which is returned herewith, together with forms SS-la as requested.

Please be advised that I paid Jockey A. Fermin the sum of \$50 in June and \$50 in July of 1940—since that time I have disposed of my interest in horses and am no longer connected with racing.

For your information I wish to advise that this is the first letter to reach me in regard to this matter, and trust that the enclosed form will enable you to close your file on the matter. [331]

“Sincerely,

J. WILD,

By

(Testimony of Robert E. Hughes.)

Does that refresh your recollection?

The Court: What is the date, July '40?

Mr. Campbell: July 1, 1941.

Q. Does that refresh your recollection?

A. No, it does not; as far as I am concerned, even in 1943 and '44 when Julius' horses ran, they were still entered under the name of Wild in the paper and in the Racing Form, and that is as far as I would know of it.

Q. So far as you know, he still had horses in July of 1941?

A. As far as the paper would state, and that is as far as I know.

Q. Well, then, let's get this straight. You know that he actually had a racing stable, that he had ownership in it other than that you saw in the paper his name? A. When?

Q. In 1941, '42, and '43.

A. Not if he says there he doesn't—why, he doesn't, I guess. But he didn't tell me about it.

Q. So when you stated he did have a stable, you were stating what you had heard, did you not?

A. That's right, sir.

Q. That's right.

Q. Now, you made some explanation of the statement you made [332] previously on cross examination, that as far as you were concerned, you were against keeping cards?

A. That's right, sir.

Q. Now, isn't it a fact that the reason you didn't want to keep the cards was the fact that

(Testimony of Robert E. Hughes.)

they might be evidence in case of a raid regarding the making of book in that establishment?

A. That is part of the reason, yes, sir.

Q. That is part of it? A. Yes, sir.

Q. Yes. It is not customary to keep records in that type of business?

A. Not in your business establishment, no.

Q. And usually the records of most of these businesses are destroyed every day?

A. Either that or kept at home where they are—

Q. Somewhere out of reach?

A. That's right, sir.

Mr. Campbell: That is all.

Further Redirect Examination

Mr. Belli: Q. It would be an easy thing to determine whether Julius had horses after '41 by the names of the horses in the Facing Forms, wouldn't it?

Mr. Campbell: Just a moment, that is calling for the witness' conclusion.

Mr. Belli: Q. Your expert opinion— [333]

The Court: Sustained.

Mr. Belli: Q. What were the names of Julius' horses?

Mr. Campbell: That is also calling for his conclusion, in view of his statement that he didn't own horses.

The Court: Not necessarily. Reference was made to two horses yesterday. You made reference to two horses?

(Testimony of Robert E. Hughes.)

The Witness: Yes, Deer Fly and Silent Julie—

The Court: Were there any others?

The Witness: He had Biloxi Bay.

Q. Wait a moment, let's have those easy. Biloxi Bill? A. Biloxi Bay.

Q. B-i-l-o-x-i? A. Yes—Bay, B-a-y.

Q. Yes?

A. Silent Julie, J-u-l-i-e, Deer D-e-e-r Fly F'l-y, Skookum Chuck.

Q. What? A. Skookum Chuck.

Q. Yes, what else?

A. Well, he had several others, the names right now have escaped me. I don't know what, just exactly what their names were. It has been so long ago, I can't remember, and I was never a sticker for that sort of stuff.

Mr. Belli: That is all.

Mr. Campbell: Just one question. Are you through, Mr. [334] Belli?

Mr. Belli: Yes, thank you.

Mr. Campbell: Just one question or two.

Further Recross Examination

Mr. Campbell: Q. Did he have these horses you just described on July 1, 1941?

A. To my knowledge he did, sir, but whether with that letter that is shown me, why, I am in doubt, myself, now. After all, he wrote it down in a letter; he must have got rid of them without my knowledge, of knowing it.

Q. Well, I take it—you have just testified that

(Testimony of Robert E. Hughes.)

he had those horses; if he had horses, that letter does not state the fact, does it?

Mr. Belli: Well, let him—

Mr. Campbell: All right, I won't bother.

Mr. Belli: He shouldn't make comments on someone else's letter.

Mr. Campbell: Very well.

Mr. Belli: I didn't object to the letter going in, because I am not objecting to anything. But I do, if he is asked to pass upon that.

The Court: Have you finished with the witness?

Mr. Belli: Yes, I have.

The Court: Step down. [335]

The Court: Is this witness excused now? Is he required for any further examination?

Mr. Belli: Well, I just talked with him, your Honor, and he asked me that, and I asked him if he would stand by. There may be something else about which we would want to call him.

Now, I understand Mr. Callahan has been subpoenaed by the Government, but that he is not going to be called by the Government, and he wants to go to Portland, so I think—he spoke to your Honor about that, I believe?

The Court: No.

Mr. Belli: Well, at any event, I know he wants to go, so I will call him myself.

Mr. Campbell: Well, the statement that he is not going to be called by the Government may not

be accurate. He has not been to this point called by the Government.

The Court: That is a correct statement of fact.

Mr. Belli: Well, we will defer to you. Do you want to call him now?

Mr. Campbell: Let's put on our case in order.

Mr. Belli: All right, Mr. Callahan come on. We will call him. We will make him our witness.

ROBERT F. CALLAHAN,

called as a witness on behalf of the defendant;
sworn. [336]

The Clerk: Q. Will you state your full name, please? A. Robert F. Callahan.

Direct Examination

Mr. Belli: Q. Now, you were subpoenaed by the Government here the other day, weren't you, Mr. Callahan? A. Yes, I was.

Q. And, first, so that the jury will know a little bit about you, you are a member and have been a member of the San Francisco Fire Department, is that right? A. That's right.

Q. And you have had some experience with the keeping of books and figures and so forth, haven't you? A. I have.

Q. You are not an accountant or bookkeeper by trade? A. No.

Q. However, you did take on some part-time job or spare time job, some bookkeeping of Julius' back in '41, '42, and '43, is that right?

A. Not bookkeeping, no.

Q. Well, what did you do?

(Testimony of Robert F. Callahan.)

A. I prepared his income tax return.

Q. And that was for the years 1941, '42 and '43, is that right? A. That's right.

Q. All right. You had known Julius before that, before then, in, shall we say, a social way?

A. Business way. [337]

Q. Business way. All right. And you were referred to him or he to you, as someone who would keep his income tax return, or do his returns?

A. That's right.

Q. Now, let's come to some point of entry here and begin with the duties that you were given there. The returns that are here that are presently under scrutiny by the Government are the returns, of course, encompassed within the indictment for 1941, '42 and '43. Now, where did you get the figures to make up those returns?

A. From Julius Wild.

Q. And did you ever see these cards here, 7, 8 and 9 of the Government? (Displaying to witness.)

A. Yes, I saw them when I was called to the Government office.

Q. Did you see them before then?

A. I did not, those particular cards, no.

Q. By the way, were you here when Mr. Krakauer testified the other day? A. I was.

Q. I ask you if you gave Mr. Krakauer at any period of time any figures or told him to make up the 12 cards to take up to Uncle Sam or take up to the Government? A. I did not.

Q. Do you recall the conversation at that time

(Testimony of Robert F. Callahan.)

with reference [338] to any 12 cards that were taken to the Government? A. Yes, I do.

Q. All right, will you tell the ladies and gentlemen of the jury just exactly what Mr. Krakauer did say and what was done at the time that these twelve cards were prepared?

A. Well, I don't recall what Mr. Krakauer said, but at the time that those cards were prepared, Mr. Wild had received a letter from the Revenue Agent's Office to bring in some substantiation in connection with regard to his '41 income tax return. I told Mr. Wild that he would have to have some records to substantiate his income tax. He told me that Mr. Krakauer would prepare them, and I don't exactly remember how the amounts were arrived at, or who arrived at them, but in no instance did I ever dictate any amounts to Mr. Krakauer to be put in any twelve cards.

Q. Were you there when Mr. Krakauer wrote the amounts on the cards?

A. I was not. I came in one day, I told Mr. Wild what we had to have, he called Mr. Krakauer in in my presence and said that we had to have records to substantiate it, and instructed Mr. Krakauer to prepare them. I came back the next day and the cards were prepared, and my recollection is that they were in Mr. Krakauer's handwriting.

Q. And those cards then were taken up to the Revenue Department and you accompanied Julius

(Testimony of Robert F. Callahan.)

up there as his agent or as [339] the man who prepared the cards, is that right?

A. No, I went as the man who prepared the return.

Q. Prepared the return—that is what I mean. Now, when you got up there, how long were you up there on that occasion?

A. Oh, my recollection is about, between 45 minutes and an hour.

Q. Did you bring the cards back to the betting establishment? A. I did.

Q. And to whom did you give those cards?

A. Gee, I don't recall with whom I left them, or whether I placed them on a table in the rear of the room with other betting cards for—what they were, I don't know.

Q. Did you tell Mr. Krakauer, do you recall, whether you had brought the cards back, or did you have any discussion with him subsequent to that?

A. I don't recall ever discussing bringing back the cards with Mr. Krakauer.

Q. When was the last time that you saw those cards?

A. The day we returned from the Revenue Agent's office.

Q. And that was in which year?

A. I believe that was in 194—I don't know whether it was '42 or '43.

Q. Well, maybe we can fix the time.

A. It was in January of either '42 or '43. I don't know which.

(Testimony of Robert F. Callahan.)

Q. All right. Now, there was some testimony by Mr. Krakauer [340] the other day about some showing of elation when you were coming back from the Internal Revenue Office. Do you recall the incident when you were coming back there, laughing or discussing anything with Mr. Julius?

A. I came back laughing because Julius had given me a tip that won.

Q. Now, with reference to Mr. Krakauer meeting at the bank subsequent to his being discharged by Mr. Wild, perhaps I should withdraw that and replace it and ask you a prefatory question. Do you know whether Mr. Krakauer left or was fired?

Mr. Campbell: Well, now, just a moment, I object to that unless it is shown in the light of a proper foundation.

Mr. Belli: Withdraw it.

Q. Do you know the circumstance of Mr. Krakauer's abrupt departure?

Mr. Campbell: May that be answered "Yes" or "No," if the Court please?

The Court: You may answer that "Yes" or "No," Mr. Callahan.

A. I am not sure what he means by "circumstance". I was not present.

The Court: All right.

Mr. Belli: Q. Well, what do you know about Mr. Krakauer's leaving the employment? [341]

Mr. Campbell: I object on the ground it is hearsay.

The Court: Sustained.

(Testimony of Robert F. Callahan.)

Mr. Belli: Q. Did you talk with Mr. Krakauer about his leaving the employ?

A. I did only in regard to a statement that I had prepared for him to sign releasing Mr. Wild, and also releasing Mr. Krakauer, that he had turned over all of the records of Mr. Wild.

Q. All right. Were you in court the other day when Mr. Krakauer testified from the stand that he had met you in the bank and told you that he was keeping all of these cards, 7, 8, and 9?

A. I was.

Q. Will you tell us what actually happened in the bank?

A. Mr. Krakauer at no time told me that he was keeping any records of Mr. Wild's. In fact, he told me the contrary at the time he signed that statement, that he had given to Mr. Wild all of the records.

Q. And by that statement, you are referring to our exhibit number—let's see, that is A. "That he has turned over all of the papers to Mr. Wild"? (Handing paper to witness.)

A. Yes, that is the one.

Q. And this paper, E for Identification, I will ask you if you have seen E before (handing to witness).

A. Yes, Mr. Krakauer had prepared this, himself, and had [342] asked Julius to sign it, and Julius asked me to prepare another one, which I did. I went to meet Mr. Krakauer, he signed it, and

(Testimony of Robert F. Callahan.)

Mr. Wild signed it, and I gave a copy to Mr. Krakauer.

Mr. Belli: All right, we offer now into evidence that which heretofore has been marked for identification as Defendant's E, being a set—

The Court: It may be received.

Mr. Belli: —your Honor, that this witness testifies was prepared by Mr. Krakauer—A, the receipt was.

The Court: They may be received and marked in evidence, Defendant's Exhibits next in order.

The Clerk: Defendant's Exhibit E in evidence.

(Defendant's Exhibit E for Identification was thereupon received in evidence.)

Mr. Belli: To read: (Reading.)

“San Francisco, California

9/29/43

“To Whom It May Concern:

I or my duly appointed representative
do hereby certify that J. Krakauer has this day
accounted to me for all monies in his charge—all
records & accounts—all building & safety deposit
keys—also any and all other material and chattels
that may have been in his care.

/s/ JULIUS WILD,

By,

or by

.....,

Representative and agent.”

(Testimony of Robert F. Callahan.)

Mr. Belli: Q. Did Mr. Krakauer tell you at any time anything as to whether these cards or any cards that were kept there represented a true picture of the business? A. He did not.

Q. Did you see this black book of Mr. Wild's at any time? A. I did not.

Q. Now, you have some sheets that the Government asked you for when you were called up there to show your work sheet on the preparation of Julius' returns, is that right?

A. I co-operated with the Government, surrendered every record that I had regarding his account.

Mr. Belli: Gentlemen, do you have the work sheet?

(Paper handed to Mr. Belli by Mr. Campbell.)

Mr. Belli: Have you any objection if these go into evidence?

Mr. Campbell: Yes, I have no objection, those are the work sheets. Show them to him. I am sure those are the work sheets.

Mr. Belli: Q. I think you recognize these, do you? A. Yes, these are in my handwriting.

Mr. Belli: May we have those as one exhibit? It makes no difference whose.

Mr. Campbell: Will he identify those and the work sheets he used from which he prepared the 1942 and 1943 returns? [344]

The Witness: That is correct.

Mr. Belli: I think he will.

(Testimony of Robert F. Callahan.)

Q. You do, don't you? A. Yes.

Mr. Campbell: I will stipulate they may be received as Defendant's next in order.

The Court: Defendant's Exhibit next in order, the work sheets of Mr. Callahan, 1942 and 1943.

The Clerk: Defendant's Exhibit G.

(Work sheets referred to were received in evidence as Defendant's Exhibit G.)

The Court: For the use of either attorney.

Mr. Belli: Q. Now, from that information on that sheet, you then computed the returns for '42 and '43, is that right?

A. From the information given me by Mr. Wild, in addition to the expenses which are all that are shown on those work sheets.

Q. All right, now—

A. I prepared his returns.

Q. Will you tell us—if I may stand up here, let's see how we can do this— We have here a yellow sheet of paper. It says, "Operating statement, 1942," and you have got June through December, and then you have got "Wages, telephone forms, service, rent, tickets, sheets, selections," and what's that, "painting, decorating"?

A. I can't see it from here. I presume it is.

Q. And what is this, here (indicating)?

A. Toilet paper and soap and sweeping compound.

Q. "Caliente, Orpheum Building, Cal. Jockey Club, Miscellaneous," and I can't read the last.

(Testimony of Robert F. Callahan.)

And "Daily Paper," and "Silent Julie." What is this "Silent Julie" over here (indicating)?

A. That is what Mr. Wild told me that the purse that he had won on the horse was, \$800, and it had cost him \$1200 to keep the horse for that year.

Q. Did you take a loss of \$400?

A. I did not.

Q. Did he have Silent Julie in '41 and '42?

Mr. Campbell; Just a moment, that is objected to as calling for this witness' conclusion.

Mr. Belli: All right.

Q. Do you know?

A. Only from what he told me. I don't know.

Q. Now, will you tell the ladies and gentlemen of the jury how you computed these figures and where you got them from, and what they were? (Handing to witness.)

A. Well, the items shown as wages were the only records that I kept. I kept the record of all wages paid, the social security and the unemployment insurance. Those figures are exactly the wages reported to me as having been paid. The telephone—Mr. Wild gave it to me as estimated at \$8 a month, and I ran it for twelve months. The Racing Forms, he told me that they ran [346] on a 30-day month, \$100, and it was by the week, evidently, so some months it ran \$125. I put that in for the whole year, but there were no receipts given to me. The same applies to the next column for service. He told me that some months it was \$100 and

(Testimony of Robert F. Callahan.)

other months it was \$125, depending upon the number of weeks in the month. The rent he told me was \$100 a month and I carried it forward each month at \$100 a month for twelve months. The tickets he estimated by the month for me as between \$30 and \$25, and sometimes in the latter part of the year, as more. I computed that as \$30 and averaged it out, going one month as high as \$38. For the racing run-down sheets, he told me that in the first part of the year they ran approximately \$60 to \$65, and in the last part of the year between \$65 and \$70. [347] The selections were the same way. He told me that it cost \$100 to paint and decorate the room during that year. He told me that it cost for toilet paper and soap and sweeping compound approximately \$15 a month and then he told me about his trips to Caliente. And in order to substantiate that, I wrote to the airline company, I wrote to the hotel, and the only receipts that I could substantiate were for \$964 and \$65 which I showed on the work sheet. He told me that he received as income from the Orpheum Building \$1,119. In that year he told me that there was no dividend paid by the Jockey Club, and I have shown it as the item of "None". The daily papers he told me were approximately \$15 a month, for the twelve months, or \$180. He also told me that he had loans at Maxferd's and Morris Plan and I checked with those two firms, but I never received anything in writing. They did tell me that he did have loans there; they were reluctant to give

(Testimony of Robert F. Callahan.)

me any information, and Mr. Wild obtained for me the interest paid in each year. I carried that forward and totaled the expenses, the total expenses being those reported to me on an estimate basis of \$17,435. Mr. Wild told me that he had made approximately \$5,000. Adding to that the sum of \$4,998.36, I then put what appears as "gross take" on this sheet, of \$22,433.61, or showing a net profit of \$4,998.36, which is the amount that was reported on his 1942 income tax.

Q. That is the amount that appears in the actual return itself, [348] is that right?

A. That's right, and I did not take any logs for the purse that was won and the cost of the horse, because in my opinion it was not a deductible expense.

Q. All right. Now about 1943—

The Court: I think we had better take a recess.

Mr. Belli: I am sorry. I didn't notice the time.

The Court: Same admonishment, ladies and gentlemen, not to discuss the case or form or express an opinion thereon until it is finally submitted to you.

(Recess.)

[349]

Mr. Belli: Your Honor, there are two gentlemen here from the loan agency. The testimony we would elicit would be entirely documentary. I wonder if we could not put them on the stand so we won't have to keep them.

The Court: All right.

Mr. Campbell: No objection.

SAMUEL ZEMAN

called as witness on behalf of the defendant, sworn.

The Clerk: Will you state your name to the court and jury?

A. Samuel Zeman.

Direct Examination

Mr. Belli: Q. You were subpoenaed the other day by the Government? A. Yes, sir.

Q. And we subpoenaed you today ourselves?

A. Yes, sir.

Q. Pursuant to the subpoena you did bring a transcript of your account with Julius Wild?

A. As many as I could.

Q. Are there others besides these?

A. There might be others. There is a card system and there might be other records that I couldn't find the cards for.

Q. Some of the property with you still has not been redeemed, [350] has it?

Mr. Campbell: Just a minute, that's objected to as immaterial.

The Court: Sustained.

Mr. Belli: Did he have to sign, or did you trust him?

A. These are signed. Those are all signed by his handwriting.

Q. Were there any for which you took his word?

A. No, there is always a signature.

Q. You don't take anybody's word?

A. Well, it is required that we have them all signed, I think, by the police department.

(Testimony of Samuel Zeman.)

Mr. Belli: We offer these as our next exhibit, four cards.

The Court: So ordered.

Mr. Belli: Q. May we keep those and we will see that they are returned to you, and we will make photostats? A. Yes, that's all right.

(Thereupon the cards referred to were received as Defendant Exhibit H.)

Mr. Belli: Q. Now, you loan on collateral rings, jewelry, and something of that nature?

A. Jewelry and diamonds, yes sir.

Q. Will you look at these cards? You are a little bit more familiar than I am, fortunately, perhaps with these, and tell the ladies and gentlemen of the jury what the dates are, [351] the collateral and dates they were redeemed and the amounts?

A. On number one, he made a loan on a gent's white gold diamond ring with six diamonds and a gold open face diamond watch about 55 diamonds, and a chain, about \$1,000 on December 2, 1941. It was redeemed on February 6, 1942.

Q. All right.

A. One was a gent's white gold diamond ring that he borrowed \$800 on and was not redeemed, but was forfeited. It was borrowed in March, 1945, and forfeited in April, 1946.

Mr. Campbell: I submit that be stricken, please.

The Court: Granted.

Mr. Belli: Q. That is out of the years 1941, 1942, and 1943, do I understand correctly?

(Testimony of Samuel Zeman.)

A. Yes, the other one, number 4, is not. That was a gent's white gold diamond ring and diamond open faced watch he borrowed March, 1942, \$750 which was redeemed a year later, March 9, 1943.

Q. Can you tell us whether you recall Mr. Wild expressing his need for this money?

A. I wouldn't know.

Mr. Campbell: Just a minute, we object to that question.

The Court: Objection sustained.

Mr. Belli: You may cross-examine.

Cross-Examination

Mr. Campbell: I didn't get your name.

A. Zeman.

Q. As long as you are here, rather than call you back, you were requested to produce certain records for the Government, were you not?

A. That's right.

Q. And released, subject to a phone call?

A. That's right.

Q. Could you state, Mr. Zeman, the amount due from Julius Wild to your firm as of January 1, 1941?

A. The amount that was due at that time?

Q. Yes. Was there any amount owing to you from him on that date?

A. Nothing except what would be on the cards. He wouldn't be for any purchases; it was all for loans. [353]

Q. Yes. Did he owe you anything on account of

(Testimony of Samuel Zeman.)

loans on January 1, 1941, and if so, how much?

A. In 1941 he owed one for \$1,000.

Q. As of December 31, 1943, did he owe you any amount whatsoever? A. 1943?

Q. Yes. A. Not to my knowledge.

Q. He didn't owe you anything according to your records? A. Not to my knowledge.

Q. So there was no loan outstanding to Mr. Weil at that time? A. That's right.

Mr. Campbell: That's all.

Mr. Belli: I have no further questions.

The Court: The witness is excused.

HARRY T. HICKS

called as a witness on behalf of the defendant; sworn.

The Clerk: Q. Will you state your name to the Court and jury? A. Harry T. Hicks.

Direct Examination

Mr. Belli: Q. You are the gentleman from the Morris Plan that brought the transcript of Julius' account, is that right? [354] A. I am.

Q. Likewise you were subpoenaed by the Government? A. Yes, sir, I was.

Q. And told to bring records, is that right?

A. That's correct.

Q. You were then released by them the other day? A. Subject to phone call.

Q. And today you got a subpoena from the defendant to appear and testify for us, is that right?

A. I did.

(Testimony of Harry T. Hicks.)

Mr. Belli: All right. These three records we offer in evidence next for the defendant as one exhibit.

Mr. Campbell: I didn't look at them. I presume each card is relevant to the period here in question.

Mr. Belli: I can not say. I have never seen these before.

Mr. Campbell: I think they should be laid before the witness.

The Witness: One of them isn't.

The Court: Examine them.

Mr. Campbell: I think one of them is a card relative to a transaction after 1943.

The Witness: That's right.

Mr. Campbell: Q. The others are in the period of 1941, '42 and '43? [355]

A. That's correct.

Mr. Campbell: May that one card be removed?

The Court: Yes.

Mr. Belli: Q. You can take Julius' current card back there and tell us about the other two where Julius was in the red side with you.

A. The loan date of June 15, 1940, in the amount of \$3090 and paid off January 14, 1941.

Q. Yes.

A. A loan made November 14, 1941, in the amount of \$2556, paid in full November 13, 1942. Those are the only two within that period, November 1941, 1942 and 1943.

Q. He had an account with you before or after, though, did he? A. Yes, he did.

(Testimony of Harry T. Hicks.)

Q. All right, just these two cards, and they indicate what he put up there as collateral, right?

A. That's correct.

Q. Stock certificates and so forth?

A. Yes, they are all there.

Mr. Belli: We will get that from someone else. We offer these as our next exhibit.

Mr. Campbell: I have no objection.

The Court: So ordered.

(Bank record in question was thereupon received in evidence and marked Defendant's Exhibit I.) [356]

Mr. Belli: That is all I have.

Cross Examination

Mr. Campbell: Q. Will you examine that, sir, and state the balance due from Julius Wild to the Morris Plan Company as of January 1, 1941.

A. \$2577.70.

Q. Will you state what balance, if any, was due from Julius Wild to the Morris Plan Company as of December 13, 1943, if any? A. No balance.

Q. In other words, he had paid back during that period of time the money which he owed you as of January 1, 1941, and had repaid any loan he made in the period, is that correct?

A. That is correct.

Q. So that there was nothing owing from him to you as of December 31, 1943?

A. That's right.

Mr. Campbell: That's all.

(Testimony of Harry T. Hicks.)

Redirect Examination

Mr. Belli: Q. However, he did not close the account with you?

A. The individual accounts were closed, but of course, it was open for future loans at any time.

Mr. Belli: All right. That is all. [357]

ROBERT F. CALLAHAN

recalled as a witness on behalf of the defendant, previously sworn.

Direct Examination (Resumed)

Mr. Belli: Q. By the way, statements were taken from you, Mr. Callahan, were they not, by the Internal Revenue Department?

A. They were.

Mr. Belli: If there is no objection, gentlemen, we have Mr. Callahan's statement. You have the original, and we offer that.

Mr. Campbell: I object to that. That is not proper.

Mr. Belli: All right.

Mr. Campbell: The witness is here on the stand.

Mr. Belli: Well, let us submit the offer of evidence to His Honor. We submit to offer in evidence the two statements made by Mr. Callahan when he was called to the Department of Internal Revenue.

Mr. Campbell: I object on the ground he is on the stand and here to testify in answer to any questions that counsel may propound.

The Court: The objection is sustained.

(Testimony of Robert F. Callahan.)

Mr. Belli: Now, you finished the one sheet. You didn't finish the other sheet. A. No. [358]

Q. Was it done in the same manner, without running over each item, the same columns and figures?

A. It was in the same manner, except in some instances the figures are changed, and in 1943 the Social Security and Unemployment Insurance showed an amount returned from the Orpheum Building was different and there was a payment by the California Jockey Club on stock.

Mr. Campbell: Will you state the exhibit to which the witness is referring?

Mr. Belli: That is A and B. I don't think we marked them A and B, but we can identify them.

Q. What is the number on the two pages?

The Court: The work sheets.

Mr. Belli: Q. Yes, the yellow large work sheets. Is that Exhibit G? A. G.

Q. By the way, the rent is listed on there as \$100, isn't it? A. The rent?

Q. Yes. A. Yes, on both.

Q. What did you ascertain subsequently the rent actually was?

A. I don't know. I just heard it in court what it was.

Q. All right. Then you can not comment on that. Did you see Julius take any sheets in the room other than the place where Mr. Krakauer was working? [359] A. Yes, I did.

Q. Did you see him do anything with those

(Testimony of Robert F. Callahan.)

sheets, or how did he operate?

Mr. Campbell: Let us have the foundation laid. I object on the ground no proper foundation has been laid.

The Court: Objection sustained.

Mr. Belli: Q. Let us have the year, the time and place and persons present—your best recollection.

A. Over a period of five or six years I saw him take bets on the phone.

Q. How large were the bets on the average?

A. I don't know.

Mr. Campbell: I make the same objection. The time has not been laid.

The Court: Sustained.

Mr. Belli: Q. You say over a period of five or six years. Does that include the period in question, 1941, '42 and '43? A. It does.

Q. What would he do with the bets that he would take?

Mr. Campbell: Same objection.

The Court: Sustained.

Mr. Belli: Q. How would he take those bets?

Mr. Campbell: Same objection.

The Court: Sustained.

Mr. Belli: That is during the years in question, Your [360] Honor.

Q. You were present at the time, were you not, Mr. Callahan?

A. On many occasions I was present in the place.

(Testimony of Robert F. Callahan.)

Q. All right, during these years, then, 1941, '42 and '43, when you state you were personally present and personally saw Mr. Wild, what did Mr. Wild do with these bets?

A. Wrote them on a piece of paper, a run-down sheet he had in front of him.

Q. What would he do with the paper?

Mr. Campbell: That is objected to as calling for the conclusion of the witness, and no foundation as to time.

The Court: Objection overruled.

Mr. Belli: Withdraw it.

Q. As I understand, the work sheets on these two pieces of paper were not taken from any cards. Now, will you tell us about 1941, the work sheet, or how you got the tax in 1941, the figures to support it?

A. In 1941 when I prepared his return I didn't have any figures. I just had the statements from Mr. Wild as to the amount of money that he had earned.

Q. With reference to the twelve cards, what year was that?

A. My recollection is now that that was in the payment of 1943.

Mr. Belli: You may cross examine.

Cross Examination

Mr. Campbell: Q. You say you have known Mr. Wild for a [361] number of years. Mr. Callahan?

(Testimony of Robert F. Callahan.)

A. Yes, I was a player in his bookmaking establishment since 1932.

Q. And that is how you happened to be present on these various occasions you had referred to; you said you had been there many times and seen many things. You were there as a customer, is that right?

A. Prior to 1942 I was, yes.

Q. And you were the person who prepared his returns for 1941, '42 and '43, is that right?

A. That's right.

Q. Do I understand correctly that in connection with the preparation of those returns you were not shown any books and records of any kind?

A. I was not.

Q. You never saw any little black book at any time?

A. I saw no little black book or big black book.

Q. As a matter of fact, didn't you on many occasions during that period of time tell Julius that he should produce some kind of books and maintain books to show what he was making?

A. I did.

Q. And that occurred on many occasions, is that right?

A. On many occasions.

Q. Nevertheless, in connection with any of these returns, he did not produce any records, did he?

A. On those twelve cards for 1941 which was subsequent to the time when the return had been made.

Q. In 1943, as I understand it, a letter was received asking for substantiation of the 1941 return, is that right?

(Testimony of Robert F. Callahan.)

A. Yes, I believe it was in January.

Q. Of 1943? A. Of 1943.

Q. It would not have been in 1942, could it, by reason of the fact that the 1941 return had not been filed in January of 1942, and I show you Government Exhibit No. 1 if you care to refresh your recollection so that the 1941 return was not in question by the Internal Revenue Agent in 1942, was it?

A. No, not that I know of, sir.

Q. Is it your best recollection that in 1943 the letter was received from the Internal Revenue agent asking for substantiation of the figures you had set up? A. That is correct.

Q. As I understand you, you were present at a conversation between Wild and Krakauer and yourself and at which I believe you say that Wild having told you first that Krakauer would prepare cards, that Krakauer was instructed to do, is that right? A. That is my recollection, yes.

Q. And you took twelve cards, as I understand you, down to the Internal Revenue agent, is that right? [363]

A. In company with Mr. Wild. I don't know which one carried it.

Q. And those were the twelve cards?

A. Those were the twelve cards.

Q. So you know at the time you took those cards down to the Revenue Agent those were not the cards you had at the time the return was made? Well, I will reframe that question.

(Testimony of Robert F. Callahan.)

At the time you took those twelve cards down and showed them to the Internal Revenue agent, you and Mr. Wild, in support of the 1941 return, you knew that those were records which had been made up within a few days of the time you went down there in 1943, didn't you?

A. No, I can't say I knew it.

Q. You were present when the instructions were given to Mr. Krakauer, according to your testimony, to make them up?

A. No, no, I don't want to be confused on that. My recollection is on that, that at the time this letter was received, Mr. Wild spoke to me about it, having made the return, and I said, "You will have to substantiate that," and he spoke to Mr. Krakauer and even at that time I never saw any records until the next day when I returned and the twelve cards were ready.

Q. My recollection of your testimony on direct examination, and correct me if I am wrong, was that Mr. Wild in your presence instructed Krakauer to prepare cards to substantiate the return; is that wrong or right? [364]

A. Whether he actually said to him in my presence to prepare them or not?

Q. Yes.

A. He spoke to Mr. Krakauer—what the exact words were I don't remember.

Q. And you knew, did you not, when you and Mr. Wild went down to the Revenue agent's office to support this '41 return that you were taking

(Testimony of Robert F. Callahan.)

cards which had just been prepared within the period of just a few days before you went down, is that correct?

A. It was my impression they were.

Q. That they were? A. Yes.

Q. Did you tell the Revenue Agent these were not cards that were prepared when the business was done back in 1941?

A. I don't even remember what the discussion was with the agent. It was mostly between Mr. Wild and the agent.

Q. All right, did Mr. Wild tell him that in your presence? A. Not in my presence, no.

Q. You were present at all times on that occasion? A. In Mr. Lippert's office?

Q. Yes. A. No, I did not hear that.

Q. As a matter of fact, they were handed to Mr. Lippert as being the twelve cards made up in 1941, weren't they?

A. My recollection was that there was a rubber band on them [365] and what was presented to Mr. Lippert I don't know, but I know there was no statement made that they had been just made up.

Q. I see. That was not told to him then?

A. No, not in my presence.

Q. And you examined those cards yourself before you took them down?

A. Did I examine them?

Q. Yes, did you examine them before you took them down? A. Yes.

Q. And they did substantiate the figures you had

(Testimony of Robert F. Callahan.)

set out in this 1941 return, Government Exhibit 1, is that right, sir?

A. To the best of my recollection they did—the exact amount, yes, sir.

Q. Yes, as I understand your testimony, the amounts set forth in here by you, for example, total receipts of \$19,758.58 was arrived at by your setting down certain expenses and then adding the sum of approximately \$5,000 and setting that forth as the receipts, is that right?

A. Yes, whatever the figure was he gave me, that is the way it was arrived at.

Q. And as I recall your testimony, you said Mr. Wild said, “I made about \$5,000,” is that right?

A. Well, that is my recollection. He did tell me off a piece of paper in his hand that it was, but I don’t remember.

Q. Did he say “\$5,000,” or did he give you a sum? [366]

A. My recollection is that he gave me a sum.

Q. Did he give you the sum of \$4998.36?

A. No, he might have given me \$5,000.

Q. Where did that \$4998.36 come from?

A. I don’t remember.

Q. Do you still have your work sheet for 1941, or did you ever have one?

A. No, I never had one.

Q. I beg your pardon. Possibly I have confused you relative to the \$4998.36. I have been questioning you as to one which is the return for 1941. Actually that figure was used by you for the

(Testimony of Robert F. Callahan.)

1942 return, is that right? A. That's right.

Q. Now, isn't it a fact that in preparing the return for 1942 and setting up this work sheet that you first decided or were told what profit to report and then set in these figures here to support that?

A. Will you repeat that question?

Q. In other words, didn't you do exactly the reverse of what you say here, as I understand your testimony here, you gathered together certain expenses, and to find your gross you added to that a sum which Mr. Wild told you was his profit? Isn't actually the figure you started with his profit, and you put together certain expenses which would appear to be reasonable for that type of business.

A. No, the figures that I put down as expenses were given to me by Mr. Wild as an average monthly expense, but there were no receipts.

Q. And you looked no further and you saw nothing further with respect to these expenses other than wages? A. That is all.

Q. For any confirmation.

A. That is correct; that is the only record I saw, was the wages and Social Security and unemployment, and I kept that myself.

Q. And the same method was followed in 1943, was it? A. That is correct.

Q. And at the time that you say you were a customer there in 1942 you were not there daily, were you?

A. No, I wouldn't say I was [368] in there daily. Sometimes I would go in once a week. Prior to

(Testimony of Robert F. Callahan.)

1941 and 1942 I was in there quite often as a player.

Q. And you believe gross take in there was \$22,000 for 1942?

A. No, since I have seen the word "take," and found what they meant by that, it should be gross profit rather than gross take.

Q. Where did that figure you have here, gross take, or gross profit, if you recall, come from, \$22,433.61?

A. By taking the expenses, adding to it the amount given to me as profit, and that is how I arrived at the word "gross take" but which should be "gross profit."

Q. Can you state definitely now, that the amount that you added, which was \$4998.36, was that sum given to you by Mr. Wild, or did you supply that figure to coincide closely to a \$5,000 figure which he gave you?

A. It could have been supplied by to coincide with the \$5,000 figure. I don't remember the exact amount he gave me.

Q. Why didn't you use the \$5,000 figure, then, Mr. Callahan?

A. I don't know.

Q. You thought this would not be questioned, did you not, if you used a figure which came out in odd dollars and cents?

A. I thought it wouldn't be questioned?

Q. Yes. [369]

A. No, I didn't think that.

The Court: Q. Did you understand the import of this last question?

(Testimony of Robert F. Callahan.)

A. He says, did I think it would not be questioned if I used that figure, and I have said I did not. Wait a minute, that has got me confused.

The Court: I think probably the witness is confused.

Mr. Campbell: Yes, I will reframe the question. The last answer may go out.

Q. Isn't it a fact, Mr. Callahan, that you used the figure \$4998.36 because you believed that using a figure of an odd amount of profit rather than an even that the Bureau of Internal Revenue would not question the report that you prepared for Mr. Wild? Do you understand the question?

A. No, I don't.

Mr. Belli: If it would save any trouble, I object to the question as being argumentative, which I should have done in the first instance.

The Court: Objection overruled.

Mr. Belli: Well, the question is argumentative. May I have my objection in the record?

Mr. Campbell: I withdraw the question and put it this way:

Q. Your purpose in using the profit figure \$4998.36 was to avoid any questioning by the Internal Revenue Bureau of that [370] return, was it not?

A. It was not, and that is the reason I told Mr. Wild that he would have to have records to substantiate it.

Q. Now, what happened when you prepared the 1942 return? A. That I told him that?

(Testimony of Robert F. Callahan.)

Q. Yes.

A. I told him that when I prepared the 1941 return, the 1942 return, and the 1943 return.

Q. And he never produced those records?

A. Never produced them.

Q. And you continued to make out his return for him?

A. I prepared it, but he signed it. I never signed it after the first one.

Q. You knew that it was not an accurate return and that was the reason you did not sign it?

A. I did not know it was not an accurate return.

Q. How does it happen you would say you did not sign it? A. That's right.

Q. And you would not sign it?

A. No, he signed it.

Q. But you didn't put your name down as the person who prepared the return, did you?

A. I did not.

Mr. Campbell: That's all.

Redirect Examination

Mr. Belli: Q. Why did you continue to make the returns for Julius? Did you believe that the figures he gave to you were correct?

A. Did I believe them?

Q. Yes, did you find him honest?

A. Yes, I always found him honest. He was the only one in a position to know as to how much he was making, and I didn't know how much.

Mr. Belli: That's all.

Mr. Campbell: That's all. [372]

Mr. Campbell: If you are through with this witness and he may be excused, we will excuse him from the Government subpoena that he is still under.

Mr. Belli: With the exception of this, that I am going to renew my offer into evidence of the statements that were taken of Mr. Callahan in 1946—I think there were two of them taken at the Department. I think that they are admissible under the question of recent fabrication; in other words, to show the testimony then is the same as the testimony now.

Mr. Campbell: Well, we will keep Mr. Callahan here available if counsel wants to question him, and we can call him to the stand. The witness is here available and can be asked any question.

Mr. Belli: I think counsel missed the point. I would like to introduce his former testimony before the Department to show that there is nothing presently said that is a recent fabrication, that it is the same testimony here as was formerly given.

Mr. Campbell: I don't admit that is the fact, but these are certainly not material or competent here.

The Court: The objection is sustained. They may be marked for identification.

Mr. Belli: May we renew that, Your Honor, if I can show Your Honor a case on that theory of recent fabrication? I would like to have it introduced to corroborate his testimony, to show [373] that it was the same as the statement which was given.

The Court: They may be marked for identification, counsel.

Mr. Callahan: May I be excused in connection with this matter?

The Court: Certainly.

Mr. Belli: Let's see. How many have we got? Have we got the statement? This is one of Mr. Hughes'.

Mr. Campbell: If those are to be marked, I have the original here.

Mr. Belli: Have you got Mr. Callahan's?

(Thereupon a conversation between Mr. Campbell and Mr. Belli occurred outside the hearing of the Reporter.)

The Court: Mr. Schaeffer advises me that Mr. Callahan has to leave the jurisdiction to go to Portland. Now both of you gentlemen are advised of that fact? It is agreeable with you that we excuse him?

Mr. Campbell: Yes, Your Honor.

Mr. Belli: Yes, Your Honor.

The Court: All right.

Mr. Campbell: Now, I have here the original signed statement which I believe certain corrections were made in from place to place, and they may be marked for identification.

The Court: So ordered, and counsel representing the defendant may renew his offer at a later stage. [374]

Mr. Belli: All right.

The Court: Defendant's Exhibit K for identification.

(Signed statement referred to above was thereupon marked Defendant's Exhibit K for identification.)

Mr. Belli: May I ask through the Court, if there are any other witnesses present that we have subpoenaed just generally?

The Court: Yes, sir.

Mr. Belli: Are there any other witnesses subpoenaed that are here today?

(No response.)

Mr. Belli: Well, I presume Your Honor will want to run a little after 4:00 today?

The Court: Not necessarily.

Mr. Belli: Well, we might start with Mr. Wild tonight. He doesn't know he is going on; I might take him by surprise and put him on to get him started.

Mr. Campbell: I have no objection to a recess, if delaying his appearance in any way damages his case.

Mr. Belli: Let him go on.

The Court: May I ask counsel how long you anticipate we will take?

Mr. Belli: Yes, shall we approach the bench?

The Court: No. How many additional witnesses have you?

Mr. Belli: Well, I think that we will take probably [375] another court day, two hours in the morning and two hours in the afternoon. Not more than that.

Mr. Campbell: In view of the statement of defense offered by counsel, the Government will have some 15 witnesses, practically all of whom are of a formal nature, however, to produce records similar to the records produced by Maxferd's, and those two witnesses who have been on the stand.

The Court: So you anticipate it will take about a day in rebuttal?

Mr. Belli: I will be willing, if there are any records that are factual records, to stipulate to those. We might have them.

The Court: Well, you would say Wednesday, and then the case might go to the jury about Thursday?

Mr. Campbell: That would be my best estimate.

Mr. Belli: You think we would be safe in saying that we will conclude them?

The Court: I think under the circumstances we might adjourn at this time.

Mr. Belli: To be sure on Thursday, we can put him on and take a little now, Your Honor, if we want to.

Mr. Campbell: I would suggest, inasmuch as we are going over until Tuesday—it is difficult to interrupt.

The Court: Yes, and the jurors have been very patient—we ran late yesterday afternoon. [376]

Mr. Belli: All right.

The Court: Although we did have a short day today, we can't hasten the trial by putting Mr. Wild on for a few minutes today.

Ladies and gentlemen of the jury, next Monday is allotted to law and motions—Mondays are ordi-

narily allotted as law and motion days in these courts; we will therefore take up the further trial of this case next Tuesday. Not Monday, but next Tuesday at 10:00 o'clock. I again admonish you not to discuss the case with any person, nor suffer any person to converse with you on any subject of the trial, and not to form or express any opinion thereon until the case is finally submitted to you for decision.

Are there any *ex parte* matters, Mr. Schaeffer?

The Clerk: Not that I know of.

The Court: Are there any witnesses who are now in attendance whom you might desire to excuse?

(No response.)

Mr. Hughes: May I be excused?

The Court: So far as I am concerned, Mr. Hughes. The Court has excused you—unless counsel desire you for some purpose.

Mr. Belli: We don't.

The Court: Do you desire him?

Mr. Belli: No, we don't need him. I think he would be in San Francisco if we did. [377]

The Court: You are under no compulsion on the part of the Court.

Mr. Campbell: The Government has excused him, subject to anything which might develop.

The Court: That is a matter for you to work out with Mr. Hughes.

Are there any other witnesses outside of Mr. Hughes now?

(No response.)

The Court: We will stand adjourned in this case until next Tuesday at 10:00 o'clock.

(Thereupon an adjournment was taken in the above-entitled case until Tuesday, August 17, 1948, at 10:00 o'clock a.m.) [378]

Tuesday Morning Session, August 17, 1948, 10:00

The Clerk: United States v. Wild, on trial.

Mr. Belli: Ready.

Mr. Campbell: Ready.

The Court: The jurors are present, gentlemen—so stipulated?

Mr. Campbell: So stipulated.

Mr. Belli: Stipulated for the defendant.

Mr. Belli: May I proceed, Your Honor?

The Court: Yes.

JOSEPH SAMMUT

called as a witness on behalf of the defendant, sworn.

The Clerk: Q. Will you state your name to the Court and jury?

A. Joseph Sammut.

Direct Examination

Mr. Belli: Q. Did you have occasion to visit Mr. Wild's bookmaking establishment during the years—you don't have to stand up, sir.

A. I never knew the man. I never knew who he is. I never met the man in all my life. I never seen the man either and I don't even know him.

Q. You don't even know him when you see him here? [379] A. No, I don't.

(Testimony of Joseph Sammut.)

Q. You have never been in his bookmaking establishment? A. No, sir.

Q. You never sent anyone to his bookmaking establishment? A. No, sir.

Q. You worked in a booking establishment during those years?

A. Yes, I had a place of my own.

Q. Where? A. On Sixth Street.

Q. And being in a like profession, you never heard of Julius Wild?

A. Never, no; I never know him or ever see him.

Q. Certainly, there are not so many books in San Francisco that you wouldn't know your competitors?

Mr. Campbell: Objected to as argumentative.

Mr. Belli: All right.

The Court: Objection sustained.

Mr. Belli: Q. And so we will be clear about it, did you have any nickname that was used during these years 1941, '42 and '43 that you bet under?

A. No, sir.

Q. It was Sammut?

A. My name is Joseph Sammut, J-o-s-e-p-h Sammut.

Q. And that is all you know? A. Yes.

Q. You don't know Mr. Wild or anybody connected with Mr. Wild, or never bet there, or sent anyone over there, and never had any runners, although you worked and had your establishment all those years?

(Testimony of Joseph Sammut.)

Mr. Campbell: Objected to as argumentative.

The Court: Sustained.

Mr. Belli: That's all.

Mr. Campbell: No questions.

EMMA MARIE WILD

called as a witness on behalf of the defendant,
sworn.

The Clerk: Q. Will you state your name to the
Court and jury?

A. Emma Marie Wild.

Direct Examination

Mr. Belli: Q. Mrs. Wild, you are the wife of
the defendant on trial here, Julius Wild, is that
right? A. Yes.

Q. And you were married where and when?

A. In 1912 in Salt Lake City, Utah, at the
Church of the Madeline.

Q. After you were married there you went to
Texas, did you? A. El Paso, Texas.

Q. And there was a little nest egg or sum of
money built up, was there, before the marriage?

A. Yes.

Q. And that was built up between Julius work-
ing and yourself, was it?

A. Julius and myself had the monies.

Q. Was Julius interested in the horses back in
1912? A. Well, that was his business.

Q. In 1912, is that right? A. Yes.

Q. What was he doing there? Was he connected
with the track or what? A. Yes.

(Testimony of Emma Marie Wild.)

Q. When you came to Texas, did you buy some property in Texas? A. Yes.

Q. In which town, and I want you to be, over the years here, as we go through them, just as detailed and specific as you can, to give us at least some pegs on which we may hang certain of these figures to build your assets, whatever they are, to the present time. So, I ask you presently, when you went to Texas, you went to what town?

A. El Paso, Texas.

Q. Did you buy some property in El Paso, Texas? A. Yes, we bought a little home.

Q. Do you recall the address, where it was?

A. It was out on Westminster—I don't recall the address. I think it was 39 Westminster. [382]

Q. You lived there for how long, Mrs. Wild?

A. We lived there for not quite a year.

Q. Did you have any other property in El Paso?

A. Well, later we bought another home, but after we left our home there we were in the apartment house business. We had thirty apartments and I managed those for five or six years.

Q. Did you own them or just manage them?

A. We owned the lease and the furnishings.

Q. Did you make any money from those?

A. Well, yes.

Q. How long did you do that, over how many years? A. It was close on to five years.

Mr. Campbell: I am going to object to this line at this time as being too remote to the years in question.

(Testimony of Emma Marie Wild.)

Mr. Belli: All right, then I will ask the next question and see if it is remote.

Q. When you came to San Francisco, how much money did you bring with you?

Mr. Campbell: May we have the time, please?

Mr. Belli: Yes.

Q. When did you come to San Francisco?

A. It was in '27 or '26, and it was in June—I don't know the exact date.

Q. June of '26 or '27?

A. Yes, June of '26 or '27. [383]

Q. How much money did you have with you?

A. Well,—

Mr. Campbell: Just a minute, pardon me—I object to that question as too remote.

The Court: Objection overruled.

Mr. Belli: Q. How much did you have, Mrs. Wild?

A. I had close to \$20,000 from rentals from the home for a period of that time, from the time in 1913 until the time we came here.

Q. Now, in El Paso, did you bank there at any place? A. City National Bank in El Paso.

Q. City National Bank in El Paso?

A. Yes, sir.

Q. When you came out here in 1927, did you bring that money by draft, cashier's check, or how?

A. In cash.

Q. How did you bring it?

A. I brought it in cash and I had it in a safe deposit box.

(Testimony of Emma Marie Wild.)

Q. In the safe deposit box where?

A. Well, some of it in the safe deposit box and I had to keep a certain amount—I kept it in the home—a certain amount.

Q. Then you brought that out here in cash with you, did you? A. Yes, I did.

Q. And when you brought that out here with you, where did you put it? [384]

A. In the beginning, we didn't put it anywhere, but when we moved to Larkspur I had a safe deposit box in Larkspur at the American Trust.

Q. Is there only one American Trust Company in Larkspur?

A. Yes, and as a matter of fact, they closed that branch just before we moved from there.

Q. How long did you have the safe deposit box at American Trust Company in Larkspur?

A. Well, I couldn't say offhand, Mr. Belli. We came over there, I think, about eight or nine years—something like that—maybe not that long.

Q. Now, with reference to this \$20,000, was that yours or was it Julius's or was it yours and Julius's?

A. Well, it was mostly from the rentals. I saved all, all what I made from the apartment and Julius worked and we lived off of that and saved even on that.

Q. Did you have that as late as what year—could you tell me? A. What, sir?

Q. The \$20,000.

A. I had that as late as in early 1941.

(Testimony of Emma Marie Wild.)

Q. And where did you have it?

A. Well, after we moved from Larkspur I had it—I transferred the business to the American Trust in San Francisco.

Q. Which branch?

A. On Grant Avenue, near Market. [385].

Q. Grant and Market branch?

A. Yes, sir, that is near Market.

Q. All right. Now, with reference to this twenty thousand, did you give that, or any of that subsequent to 1941, to Julius?

A. No, I didn't touch that.

Q. What happened to the twenty thousand?

A. I gave that—during that period Mr. Wild needed monies and I gave most of it to Julius during the period of 1941, '42 and '43.

Q. Why did he need money during that period, do you know of your own knowledge?

A. Well, like always during the past years he had always come to me where his business demanded it, where he would have great losses and I would have to out of savings and what have I, furnished him the wherewith.

Q. Was he drinking during those years, Mr. Wild, '41, '42 and '43?

A. Well, not to any extent. He would take a drink or so. He would drink, yes.

Q. You lived with him continuously up to the present time as husband and wife, didn't you?

A. Yes.

(Testimony of Emma Marie Wild.)

Q. Was there any period of time when the two of you were separated?

A. Yes, for a while. [386]

Q. What year?

The Court: What possible bearing would that have on the controversy?

Mr. Belli: It would indicate any derelictions Mr. Wild might have had mentally that might have accounted for his losses during the period, rather severe losses.

The Court: The defendant's mental derelictions are not at issue here.

Mr. Belli: Your Honor recalls what went on before the trial.

The Court: If you want to draw any inferences from that, I am sure Mr. Campbell would consent to a full and open disclosure on everything that took place before and during the trial. I venture to suggest to you that this line of examination has very little bearing, if any, on the controversy.

Mr. Belli: I think it would show that the man's net worth at the beginning of the period and end of the period would indicate he could not have made the money the Government claims.

The Court: I particularly directed your attention to the matter of separation, or alleged separation, and any domestic discord that may have followed.

Mr. Belli: Not as to the question of the net worth?

The Court: That is a matter that still bears

(Testimony of Emma Marie Wild.)

some observations, but thus far I can not see the relevancy of the point. [387]

Mr. Belli: Of which question?

The Court: The question of the net worth at this juncture.

Mr. Belli: For the purpose of the record, may I take exception to Your Honor's remark and ask Your Honor respectfully to instruct the jury to disregard them? May I proceed, Your Honor?

The Court: Ladies and gentlemen of the jury, counsel has requested I instruct you concerning your possible disregarding of the matter of the net worth. At a proper stage in this case I will instruct you fully with respect to the matter of delineation of the evidence concerning the defendant's income during the years 1941, '42 and '43. I again reaffirm what I have already announced to you, that the matter of the net worth in years long prior to 1941, '42 and '43 have no possible relevancy or bearing upon the activity of the defendant Julius Wild during the years in question.

Mr. Belli: May I also take exception respectfully to those remarks to the jury at the present time, for the purpose of the record?

The Court: You may take an exception.

Mr. Belli: I shall then desist from any questions of any marital discord and go into the question of net worth and bring it up to the present time.

The Court: Unless, counsel, you have some reason not thus far disclosed why you feel that such testimony would have a [388] possible bearing.

(Testimony of Emma Marie Wild.)

Mr. Belli: Well, I don't want to prejudge the rebuttal of the Government, but if it becomes necessary to go into that I am sure Your Honor—as Your Honor has in the past, will give me all the leeway necessary to go into that.

The Court: If at the proper time you can indicate to the Court the relevancy that testimony might have, you may go into that.

Mr. Belli: We will desist presently and conclude with the net worth.

Q. Coming up to the year 1941, Mrs. Wild, I think we have established there was funds and cash of some \$20,000. Of this cash how much was left in the period 1941 to 1943?

A. Of the cash in the bank?

Q. Yes.

A. \$1994.92, or 1992.94 at the end of 1943.

Q. You have some savings books indicating that?

A. Yes.

Q. With reference to savings accounts, at the beginning of the period, that is, at the period 1941 and including 1943, did you have a savings account any place? A. Yes.

Q. And where was the savings account? Give us the name of the bank, the branch and everything else.

A. Well, from 1941 it was the Day and Night Branch of the [389] Bank of America and from early 1943 it was in Redwood City at the Bank of America on Broadway.

Q. Is that the bank that you mentioned there

(Testimony of Emma Marie Wild.)

was \$1992.94 that was left at the end of the period?

A. Yes, I am quite sure.

Q. And again, how much was in the savings account at the beginning?

A. In the beginning there was \$3525.

The Court: Q. What was that figure?

A. \$3525 at the beginning.

Mr. Belli: Q. You have the bank books on them? A. Yes, but I didn't bring those.

Mr. Belli: Well, we will have those.

Q. Now, outside of this one lump sum of cash that you had brought from Texas—well, we will let that go for the moment. Outside of the lump of cash did you and Julius have any other cash?

A. Yes, there was earnings of his we saved to live on.

Q. How much did it cost you a month to live during the period 1941, '42 and '43?

A. Well, I should judge close to \$400, between \$350 and \$400.

Q. Where did that money come from?

A. Well, out of stocks and savings.

Q. Now, you mentioned some stocks. There are stocks in Orpheum, Universal Totalisator and California Jockey Club? [390] A. Yes.

Q. There are no other stocks than that, or are there? A. No.

Q. Are those stocks held jointly between you and Julius? A. Yes.

Q. In both your names?

(Testimony of Emma Marie Wild.)

A. Yes—outside of the California Jockey Club—in my name.

Q. At the beginning of the period, do you recall how many shares you had in the Orpheum Building?

A. At the beginning of the period it was around 1577 shares. [391]

Q. At the end of the period?

A. At the end of the period it was 3987, or something—it was approximately close to that.

Mr. Campbell: Is this California Jockey Club?

Mr. Belli: This is just the Orpheum, the first block.

The Witness: Yes, the Orpheum.

Mr. Belli: Q. You know the figures; you have gone over them with Mr. Bauer on my account?

A. Yes.

Q. And we have the lum sum of cash; No. 2, the savings account; and No. 3, the Orpheum stock?

A. Yes.

Q. And you say 1577 shares in the beginning?

A. Yes.

Q. That was 1941? A. Yes.

Q. And that was increased to 3978 during the period 1941 to 1943, is that right? A. Yes.

Q. Now, No. 4, of the assets on the second block of stocks, the California Jockey Club, how many shares did you have at the beginning or before 1941? A. Before 1941?

Q. Yes. A. Just myself, or——? [392]

Q. Between the two of you.

A. Between the two of us?

(Testimony of Emma Marie Wild.)

Q. Yes.

A. 180 shares, but the original—when it was bought in the period of 1934, that is, when the California Jockey Club was incorporated, the shares were \$100 a share, and 100 shares—that would be \$10,000 that Julius paid and then he bought 10 shares from Mr. Benn for cash, \$60. So the original cost of the 180, of which—well, that was \$10,600. That was in 1934 when they were incorporated.

Q. Before 1941 you had \$100 a share and there was a stock dividend that gave you 180?

A. No, 110 shares with the 10 from Mr. Benn; but there was 70 shares given as dividend and that was held in escrow for a period of years.

Q. But that was all before 1941?

A. Before 1941 they were issued. I think they were issued in—I don't remember, it may have been 1937 or in that whereabouts.

Q. Well, we will get that. But between 1941 and 1943, there were, as I understand, 10 shares bought?

A. Of California Jockey Club?

Q. Yes, of the California Jockey Club.

A. No, of the totalizator.

Q. None of the California Jockey Club? [393]

A. No.

Q. And then, of the totalizator—by the way, that is one of those machines that they use at the track?

A. Yes.

Q. Did you have any of that before the period of 1941?

A. No.

Q. Did you buy that after 1941?

(Testimony of Emma Marie Wild.)

A. Julius did.

Q. What?

A. I'm quite sure Julius did.

Q. You didn't have anything before?

A. No.

Q. In between 1941 and 1943 how many shares of that were bought? A. There were only 10.

Q. Now, the 6th item, the home—how much did you pay for the home? A. \$7500.

Q. When did you buy that?

A. In 1943 we moved in, in April.

Q. April, 1943? A. Yes, April, 1943.

Q. That was the full price of the home?

A. Yes.

Q. \$7500? A. Yes. [394]

Q. That is the home down in Redwood City?

A. Yes, that is the home down in Redwood.

Q. With reference to Government Bonds, they were not issued before 1941, of course?

A. No.

Q. So you bought some Government Bonds, did you, between 1941 and 1943? A. Yes.

Q. Do you recall how much they amounted to, or how much they were?

A. Well, according to what I can figure, it is around 4500, but I think there was more that was given as charities.

Q. What do you mean, given as charities?—Given to you as charities?

A. No, not to me; but Mr. Wild gave. I think there are some bonds out, and I couldn't say.

(Testimony of Emma Marie Wild.)

Q. You mean that he bought and gave to charity? A. Yes.

Q. Well, we will ask him about that; but you bought around \$4500, is that correct?

A. Possibly, yes, I couldn't say the exact figure.

Q. Do you yourself know about the Howard and Waters loans?

A. Yes, Julius had borrowed off of them frequently.

Q. Do you know how much the Howard loan was and how much the Waters loan was? [395]

Mr. Campbell: Just a minute, that's objected to as not the best evidence, The Court, and heresay.

The Court: Objection sustained.

Mr. Belli: We will ask Mr. Wild on that, Your Honor.

Q. Now, during the period 1941 to 1943, did you have any extraordinary expenses, or extraordinary luxuries, or any luxuries of any kind? Any coats or diamonds? A. No, I lived very thrifty.

Q. You lived down at this place in Redwood City all the time?

A. Well, from 1943; we moved down in 1943.

Q. Did you take any trips or any vacations with Julius? A. No.

Q. When he would go down to Caliente or San Diego on those week-end trips you did not go with him?

A. Not very often. Maybe occasionally I did.

Q. Sometimes?

A. Sometimes, yes, but not every time he went down.

(Testimony of Emma Marie Wild.)

Q. All right, Mrs. Wild, first let me ask you: Did you have anything else during this period that was given to you or that you got from your husband or from anybody in the world during the period 1941 to 1943 other than that which you have told me? Did you have any other safe deposit boxes or did you have any other savings accounts or did you have any other jewelry anyplace in the world other than that which you have told us about during the period 1941 to 1943? [396]

A. What jewelry I had was before that time and Julius always had diamonds.

Q. Was this before 1943?

A. Yes, that was before 1943. I have the ring that was made up when we were first married.

Q. All right, but you got none during this period? A. No.

Mr. Belli: You may cross-examine. [397]

Cross-Examination

Mr. Campbell: Q. Now, Mrs. Wild, do I understand your testimony that as of December 31, 1940, or January 1, 1941, you had some \$20,000 in cash?

A. Yes.

Q. And that cash was kept either in your home or in the safe deposit box? A. Yes.

Q. Where was it kept, the safe deposit box or in the home? A. Most of it in the home.

Q. How much of it in the home?

A. Oh, I should judge over \$10,000.

Q. And the balance was kept in the safe deposit box? A. Yes.

(Testimony of Emma Marie Wild.)

Q. It was not in any bank account anywhere?

A. Not that, no.

Q. And in what form did you have it?

A. Well, I brought it out, or——

Q. I mean to say, was it in currency?

A. In currency.

Q. In what denominations in currency?

A. In \$1000 bills.

Q. You had 20 one thousand dollar bills?

A. Outside of that?

Q. No, you had 20 one thousand dollars bills?

A. No, not 20 one thousand dollars bills.

Q. How many one thousand dollar bills did you have?

A. Well, I can't tell off-hand. That is quite a bit of time ago.

Q. Was it as much as half the money that was in one thousand dollar bills?

A. Probably, yes.

Q. So you had at least 10 one thousand dollar bills? A. Yes.

Q. Now, when did you cash any of those one thousand dollar bills?

A. I didn't cash any of those one thousand dollar bills. That was a nest egg I held onto.

Q. Do you still have it?

A. No, I don't; but Mr. Weil got most of the money during that period of time.

Q. Can you tell us any time you gave him any one thousand dollar bills? A. Oh, yes, sir.

Q. All right, what dates?

(Testimony of Emma Marie Wild.)

A. I couldn't say the dates, sir.

Q. Did you give him any one thousand dollar bills in 1941? A. I don't recall.

Q. Did you give him any one thousand dollar bills in 1942?

A. I probably have; I wouldn't know.

Q. Have you any definite recollection at this time? [399] A. No, I don't.

Q. Did you give him any one thousand dollar bills in 1943?

A. Yes, I think—Well, I don't recall that it was early—

Q. You don't know?

A. I didn't keep track of it or keep a record of it.

Q. You are aware of the fact that banks make a record when a \$1000 bill is presented?

A. I don't know where Julius cashed it, or if he did.

Q. I was just going to ask you; do you know where Julius cashed any of these \$1000 bills?

A. No, I don't.

Q. You do recall definitely that part of this money was in \$1000 bills that you gave him?

A. Usually in \$1000 bills, \$500 bills and \$100 bills.

Q. You had no bills smaller in denomination than \$100, is that right? A. No.

Q. Incidentally, Mrs. Wild, during 1941 and 1942 you and Julius were living separate and apart, were you not, is that right? A. Yes, sir.

(Testimony of Emma Marie Wild.)

Q. And Julius, as a matter of fact, was paying you for your support \$100 during that time, wasn't he?

A. Not regular—spasmodically. In 1938 and 1939 he paid.

Q. Didn't you report on your income tax returns for 1941 and [400] 1942 that you received that sum?

A. Yes, but I didn't get it regular. I have the copies, and as a matter of fact I think it is on 1938 where it was agreed that he give me \$100 a month, but I didn't get that regular; it was spasmodically.

Q. So, in filing a return that he was paying you \$100 a month, you did not state what the actual fact was? A. Sir?

Q. When you filed a return that he was paying you \$100 a month during the period of the separation that was not the fact that you were——

A. As a matter of fact, through those years I was giving him money. It was just off of dividends.

Q. Yes, but you reported, however, to the Government that he was paying you money?

A. In 1938 I reported, but he didn't continue.

Q. Didn't you also so report in 1941 and 1942?

A. I haven't that in mind—I don't remember.

The Court: You better present the documents to the witness.

Mr. Campbell: Yes, I am going to, your Honor.

The Witness: I have a copy, but I don't recall that.

Mr. Campbell: Q. Let me call your attention to Government's Exhibit No. 4, the return of Emma

(Testimony of Emma Marie Wild.)

M. Wild for 1941. That is your return, is it not, Mrs. Wild?

A. Yes. Well, sir, this here is dividend on the stock. [401]

Q. That you have reported there?

A. Yes, that is dividend on the stock.

Q. The fact that it is the sum of \$1200 is something you say that was dividends?

A. Yes, I am quite sure.

Q. All right, I will show you Government Exhibit No. 5, the return for 1942. Is your testimony the same as to that?

A. Well, in 1942 there was no dividend.

Q. That is correct? A. Yes.

Mr. Belli: Will you talk a little louder, Mrs. Wild?

The Witness: Yes.

Mr. Campbell: Q. Does that refresh your recollection as to the amount of \$1200 you are reporting there that you received from Julius Wild?

A. Well, it probably was not all from him. I probably added to it.

Q. What other sources of income did you have in 1942? A. No other income.

Q. No other income?

A. It probably was what he gave me.

Q. That refers to the money he gave you in 1942?

A. It must be, because there was no dividend in 1942.

Q. Do you recall, Mrs. Wild, being interviewed

(Testimony of Emma Marie Wild.)

by Special Agent William Burkett on December 16, 1946? [402] A. Yes.

Q. You recognize him here in the courtroom?

A. Yes, I do.

Q. Didn't you state to him on that occasion, during that interview, that the only property that you had as of January 1, 1941, was that which was reflected in the bank accounts or in the Jockey Club or Orpheum stock?

A. No, I didn't state that. He asked me if I had a safe deposit box and how I kept my money, and I didn't specifically tell him.

Q. You did not specifically tell him?

A. No, I didn't; I recall that.

Q. Didn't you state to him specifically that you had no money in cash other than what was represented in the bank account as of January 1, 1941?

A. I don't recall that.

Q. You don't recall making any such statement?

A. No, I don't.

Q. Now, Mrs. Wild, you referred to a savings account which you had in 1941 at the Day and Night Bank, and stated that you had some \$3525, approximately, there at the beginning, is that correct.

A. Yes.

Q. And I believe you stated that you also had a savings account or a savings account in your name—pardon me, was that [403] account in your name that I have referred to?

A. That was in my name. The one you are referring to?

(Testimony of Emma Marie Wild.)

Q. In the Day and Night Bank. A. Yes.

Q. Was that savings account No. 28603?

A. I couldn't recall that.

Q. You couldn't recall that? A. No.

Q. But if I mention the figure to you of \$3537.25 as being the amount on January 1, 1941, would you say that is correct? A. Yes, that's correct.

Mr. Belli: How much was that?

Mr. Campbell: \$3537.25.

Q. Was there also another savings account you know of being numbered 220 in the amount of \$352.25? A. Where?

Q. At the Day and Night Bank.

A. I don't recall that.

Q. You don't recall that?

A. I don't recall that.

Q. I believe you stated as of December 31, 1943, there was a savings account in the Redwood City Branch of the Bank of America. A. Yes.

Q. Would that be account No. 298? [404]

A. Yes.

Q. You mentioned the sum of \$1992. If I mentioned the sum of \$1992.24, would that be correct?

A. That would be close. I don't know what the cents were, but it is close, yes.

Q. Did you know, also, about a commercial account in the name of Julius at the American Trust Company, Civic Center Branch, on the 1st of January, 1941?

A. I knew he carried his account there, but as

(Testimony of Emma Marie Wild.)

far as what he had there, I couldn't give you any account on that.

Q. Do you recall the fact that as of December 31, 1943, there was a commercial account in the American Trust Company, Civic Center Branch, in the name of Julius and Emma Wild, in which there was deposited on that day \$2108.82?

A. Julius and Emma Wild?

Q. Yes. A. I don't know of that.

Q. You don't know of that? A. No.

Mr. Belli: How much was the amount?

Mr. Campbell: \$2108.82.

Q. Now, you refer to certain United States savings bonds which were purchased during the period. You gave a sum, I believe, of approximately \$4,500.

A. Not quite \$4500, and what Julius has bought other than that [405] I wouldn't know, if there are others outside of that. I know that he bought two for charity, for Monsignor Collins, and Bishop Shuler.

Q. You had no savings bonds in 1941, there having being none issued?

A. No, none were issued.

Q. If I stated as of December 31, 1943, you and Julius had uncanceled or unredeemed bonds of a total purchase price of \$4012.50, does that refresh your recollection?

A. I can recall one that I cashed in.

Q. But taking into consideration bonds which may have been cashed, did you as of December 31,

(Testimony of Emma Marie Wild.)

1943, still have on hand bonds which cost \$4012.50?

A. Yes.

Q. That would be correct?

A. Yes, I think so.

Q. Now, I believe you said you and Julius had purchased some shares in the Jockey Club, but your entire investment was made prior to January 1, 1941, was it not?

A. Oh, yes, that was made during the period before 1934—see?

Q. When the club was being built?

A. Yes, when the club was being built in 1934.

Q. You did not either dispose of any shares you might have had or purchase any more shares during the period 1941, '42 and '43? [406]

A. Well, I didn't; but Julius bought ten shares from Eddie Benn.

Q. In what year did he buy that?

A. I don't know just what year.

Q. Was it during this period of 1941, 1942 or 1943? A. No, it was not during that period.

Q. No, I was asking you if you purchased any more during that period.

A. No, not during that period.

Q. Or did you dispose of any? A. No.

Q. So, your investment in the Jockey Club remained the same throughout the period of time?

A. Yes, since 1934.

Q. And it was approximately \$10,600?

A. Yes, that was the original price.

Q. You would state, however, that you had increased your holdings in the Orpheum Building

(Testimony of Emma Marie Wild.)

Company during the period here in question, would you? Is that correct? A. Yes, sir.

Q. I believe you stated that prior to January 1, 1940, you had a certain number of those shares?

A. Yes, sir.

Q. Was that 1400 shares?

A. Fourteen, or about that, or 15—something around there. [407]

Q. Do you recall how much?

A. I think 1577 shares, I think it is.

Q. Wasn't the exact amount \$1400, represented by certificate No. 232 issued on September 3, 1940? Would that be right?

A. Probably that's correct.

Q. And wasn't your investment approximately \$3850 in that first acquisition?

A. I wouldn't know; Julius bought that.

Q. You don't know that?

A. No, I don't know that.

Q. Now, during the period 1941—

Mr. Belli: May I interrupt here? I wonder if we could stipulate on the average cost of these shares? The Orpheum, \$3.25, would that be about right?

Mr. Campbell: Well, Mr. Belli, I have the low figure for each of the acquisition days, and we are willing to accept that if you are willing to stipulate that. We have secured the high and low, and we have a witness from the brokerage house ready to testify to that.

Can it be stipulated, then, that the following shares were acquired on the dates and at the low

(Testimony of Emma Marie Wild.)

figure for that day which I will state in each case.

Mr. Belli: These are checked from the registrar of the stock?

Mr. Campbell: That's right, we have checked with the [408] registrar and we have checked with the brokerage house.

Mr. Belli: All right.

Mr. Campbell: On March 10, 1941, there is a certificate No. 918, for 100 shares, low for that day being \$3.25 per share, or \$325.

On August 30, 1941, by certificate 989, 418 shares; low figure for that day being \$3.25, for a total of \$1358.50.

September 19, 1941, certificate No. 994, for 606 shares, low for that day being 2.5 per share, or \$1515.

On September 24, 1941, certificate No. 997, for 275 shares, the low for that day being \$2.75, for a total of \$756.25.

On October 3, 1941, certificate No. 998, for 100 shares, the low for that day being 3.375 per share, or a total of \$337.50.

On October 15, 1941, certificate 1002 for 113 shares, the low for the day being \$3.375, or a total of \$381.38.

On December 10, 1941, certificate 1030 for 118 shares, the low being \$3.5, for a total of \$2513.

On May 28, 1943, certificate 1251, 50 shares, the low for the day being \$4, or a total of \$200.

On June 1, 1943, certificate 1256, 200 shares, the low for the day being \$4, or a total of \$800.

Mr. Belli: Low being how much?

(Testimony of Emma Marie Wild.)

Mr. Campbell: \$4 even. The high was \$4.3750, but [409] we adopted the low.

On July 21, 1943, certificate 1285 for 212 shares, low for the day being \$4 even, or \$848.

On August 12, 1943, certificate 192, for 1000 shares, low for the day being \$4.5, or \$4500.

On November 23, 1943, certificate 1311, for 186 shares, the low for the day being \$4.875, or a total of \$906.75.

Will it be stipulated that those shares were purchased on those days and for those amounts?

Mr. Belli: They add up to how much, Counsel?

Mr. Campbell: I am just about to give that. The certificate which I have read as being purchased in 1941, 1942 and 1943 add up to \$14,441.38, there having been on hand, purchased in 1940, 232 at \$3850, so that the total shares represented a cost of \$18,291.38, figuring at the low of each day of acquisition.

Mr. Belli: Your two totals are the total at the beginning of the period plus the total at the end of the period, which is eighteen and what?

Mr. Campbell: \$18,291.38.

Mr. Belli: That includes what he had before the period?

Mr. Campbell: That includes \$3850 before the period and \$14,441.38 during the period.

Mr. Belli: We will stipulate to that.

Mr. Campbell: So stipulated. [410]

Q. You stated during this period, Mrs. Wild, that you and Mr. Wild purchased some 10 shares

(Testimony of Emma Marie Wild.)

of totalizator stock. Can you state how much was paid per share for that?

A. Well, the price was \$100, but I don't know what the transaction on that was, how it was paid out, or whether there was money in on them, or maybe a debt owing him—I don't know.

Q. The price was \$100 a share? A. Yes.

Q. Or \$1000 for the 10 shares, is that right?

A. Yes.

Q. During the period in question here you also acquired a new automobile, did you not?

A. Yes.

Q. What make of automobile was that?

A. A Dodge.

Q. Do you recall the purchase price of that Dodge?

A. I think it was about \$1200 and something, and I paid it off.

Q. Would it refresh your recollection that the new Dodge was purchased on February 21, 1941, and the price was \$1445.76? Does that figure refresh your recollection?

A. I have it at \$1200 and something.

Q. You were, as a matter of fact, given a trade-in allowance of \$365.12 on an old Dodge you had prior to 1941? [411]

A. It was an old Studebaker.

Q. Well, an old car.

A. Yes, that was the turn-in price.

Q. You had also a Pontiac car during the period? A. Not me.

(Testimony of Emma Marie Wild.)

Q. Mr. Wild had?

A. I don't remember whether he acquired that during the period or not.

Q. You recall he had a Pontiac?

A. He had a Pontiac, but I don't know whether it was in 1941 or 1942.

Q. Do you recall the fact that a residence was purchased in 1943? A. In April.

Q. At Redwood City, I believe?

A. Yes, sir.

Q. For 7500? A. Yes.

Q. And that was paid in cash? A. Yes.

Q. And you paid the full amount of the purchase price?

A. Yes, but between the two of us, yes sir.

Q. You recall, also, during this period, that Julius acquired a rather expensive diamond ring in some transaction which he had? [412]

A. I wouldn't know about that.

Q. You wouldn't know about that? A. No.

Q. And I believe you stated that your living costs during this period of time were fairly nominal; you had estimated them at \$350 to \$400 a month, is that right? A. Yes.

Q. And that was throughout this period?

A. How?

Q. \$350 to \$400 a month?

A. Yes, that is for the both of us, possibly.

Mr. Campbell: That is all.

Mr. Belli: That's all, thank you, Mrs. Wild.

Your Honor, may we have the recess at this time?

The Court: We will take the morning recess at this time, ladies and gentlemen. I again admonish you not to discuss this case among yourselves nor suffer or permit anyone to converse with you on any subject in connection with the trial, nor form or express any opinion thereon until the matter is finally submitted to you.

(Recess.) [413]

JULIUS WILD,

called as a witness in his own behalf, sworn.

The Clerk: Q. Will you state your full name to the jury? A. Julius Wild.

The Clerk: Thank you.

Direct Examination

Mr. Belli: Q. Julius, you are the defendant in this suit, are you? A. Yes, sir.

Q. Living presently in Redwood City?

A. Yes, sir.

Q. And your wife preceded you to the stand here, is that correct? A. Yes, sir.

Q. With reference to your activities in the horse racing business, have you been engaged in that all your life? A. 49 years.

Q. And when you lived in Texas, just before coming here—and you will be brief on this—what work were you doing there? A. In Texas?

Q. Yes.

(Testimony of Julius Wild.)

A. Well, I was messenger boy at the race track, I was a bartender, and I also run and managed the Knickerbocker Bowling Club and—well, I was in charge—everything—and I had charge of the Soldiers Club during the war, two years, and on Armistice [414] Day I quit. They wanted me to go and get some—one of these young fellows—

Mr. Belli: Well, let's skip that.

The Witness: They wanted me to go to New York to go overseas and meet Mr. Fosdick—

Mr. Belli: Wait just a minute. Throughout your testimony remember the horse that was named after you, and just answer the questions and we will get along faster here.

When you were making book, as the expression goes when you were in Texas, where were you there? A. At the racetrack, yes.

Q. Where? A. In Juarez.

Q. Was it legal in Texas?

A. That was in Mexico.

Q. When you came out to California—who had the management of the family funds, you or your wife or both of you? A. My wife at all times.

Q. Do you know what money she came out here with?

A. She was pretty well heeled. I did not know the exact amount of it. We had a joint account. I never drew a check—never drew a dollar of Mrs. Wild's account in my life.

Q. By the way, how long have you known Mr. Krakauer?

(Testimony of Julius Wild.)

A. Mr. Krakauer—I met him when I was tending bar. I used to wait on him and his brother when I was a bartender, right [415] across the street from him.

Q. Where was this?

A. In El Paso. They had a big hardware store, the biggest in the city over there.

Q. And then did Mr. Krakauer come to California with you?

A. No, I think I came before he did.

Q. When you got out here, did you go into the booking business right away?

A. I did not. I was a clerk in a bookie at the Ormay Club at 1164 Market Street.

Q. How long were you clerk before you got your own book?

A. I was clerk about two years, I would say about two years.

Q. When did you take over this business at the basement of the Orpheum Building?

A. At the Orpheum Building after Jim Bailey left it, he turned it over to me.

Q. Before you went into the Orpheum Building were you some place else making book?

A. Yes, I would go to Los Angeles when the races was there at the old Santa Anita racetrack. I used to book out on the lawn, when it was legal.

Q. What date was it, so we can fix it, that you started in in the Orpheum Building?

A. I couldn't even tell you what year.

Q. About when? [416]

(Testimony of Julius Wild.)

A. I would say maybe around 1935, I was in there off and on.

Q. About 1935 you started, is that right?

A. Around 1935.

Q. That went on until about what year?

A. That went to the end of September 1944.

Q. After Mr. Krakauer left, was there very much business, or can you tell us how much business there was?

A. Well, after Mr. Krakauer left there—before he left he did not have the room, I guess you would call it. The heat was on. Everybody just booked quietly, not with an open room. We had an office—which I did—and the elevator would ring for me and they would meet me at the desk.

Q. When was the occasion that you would call it, that the heat was on, what year was that?

A. That was the early part of 1943.

Q. Early in 1943? The heat then stayed on, as I understand it?

A. Oh, yes.

Q. Now, let's go back to the beginning. We have gone to the end there. I will ask you one further question with reference to the end of the period, and we will go back to the beginning and get the details.

What were the circumstances of the termination of the employment of Mr. Krakauer? Is that too formal a question for you? Do you understand what I mean?

A. No, I know what you mean.

Q. Tell us how Mr. Krakauer left there.

A. Well, it was in September of 1943 and we

(Testimony of Julius Wild.)

were playing pinochle, the boys and I, which I always did during business—there was no business, only the telephone rang, and some of the boys sitting at the desk answered, and we had our lunch—I furnished the lunch. So Mr. Krakauer was attending to the business and I had Jack Snell working there at the desk.

Q. Who? A. Jack Snell.

Q. Go ahead.

A. And Mr. Krakauer—we carried some money from day to day, and there was no bookkeeping. There was no cause to keep books, as we just went from day to day.

I gave the boys half salary if I would lose, and full salary if I made money, which you can not make any money that way.

In any event, that night he said, “We got \$600 over there, Jules,”—which was the last day of the week. Ordinarily we start with about \$200, and that was about all—the whole week’s accumulation. It might have been Friday. Anyway, I said—one thing, he would give me a little slip and that was the money and he would go to put it in some book or something, but—I don’t know what made me do it, but I went over and counted it, and I said, “Why, you kind of gave me a short count.” In other words, there was \$800 over.

Q. There was \$800 over? [418]

A. In other words, there was \$200 difference. He reported this to me, and there was \$800 over.

So he counted, and he counted \$800, and he said,

(Testimony of Julius Wild.)

“Ain’t a fellow liable to make a mistake?”

I said, “Not exactly, the man that you are, you are not making no \$200 mistake,” and I said, “This ain’t the first time,” I said, “I found that out. I am not as dumb as you try to make me believe,” and I said, “From now on you and I are through. You can keep your keys, and you can take everything that you got out, when you get good and ready. You can come here when business is over, but you are not working for me any more.” [419]

He said, “I will get even with you,” and that was the end of that. and he pointed his finger at me.

Q. This was what day?

A. This was in September, 1943. I don’t know the exact date.

Q. In September, 1943, is that right?

A. Yes.

Q. And he left there after that. Did he come back?

A. If he came back—he had the key, but he did not get any more salary.

Q. Did you see him in and around the place after that? A. I saw him on the street.

Q. Were you friendly after that?

A. I had no hard feelings, only I did not want him to work for me anymore. That was the only time I was able to say that, because I was in his debt all the time he worked for me.

Q. Had you noticed any shortages around there, during the period that he was with you before, and explain what they were.

(Testimony of Julius Wild.)

A. It happened so often, it was pitiful. I used to go there after he went home at night, and find them shortages. I would work until six o'clock in the morning, and I would get no place. I would count the other boys' business, and I would count his business, and he would have \$400, and the other boys had \$600 in there. In other words, the other boys done 3 to 2 the work that he done— $\frac{2}{3}$ more than he done. [420]

Q. You speak of the shortage. This was an overage of \$200. this last incident?

A. I know. It was not an overage, this last incident. It was an overage on him reporting \$600. His card showed \$600 and my money was \$800.

Q. Would that be a loss for you?

A. If I had let it go, he would have got the other \$200.

Q. All right, with reference to the way any books were kept in there, these cards that have been introduced in evidence here, so the ladies and gentlemen of the jury will understand it, how would it run or how was it run?

A. My bookkeeping?

Q. Yes.

A. When Mr. Krakauer put his card system in—

Q. You refer to Exhibits 7, 8, and 9—

A. Yes, when Mr. Krakauer came to work for me, we had a system, Bob and I, and I was the—

Q. By Bob you mean who?

A. Bob Hughes, and Clarence Collard.

(Testimony of Julius Wild.)

Mr. Campbell: I suggest that the answers will be confined to the question, your Honor.

Mr. Belli: Will you continued?

Mr. Campbell: May I have the time and place?

Mr. Belli: Q. What was it, what bookkeeping system?

A. The bookkeeping system was—well, I guess about six or [421] seven or eight months after he was there—or I would say six months—

Q. He went there when?

A. When I came back from Winnipeg, he was there.

Q. What year was it? A. 1936.

Q. All right, then he put in this card system himself in 1936, is that correct?

A. He showed me, it was improvement.

Q. What did you do?

A. Well I said, "If you can find any improvements, Julius, you go to it."

Q. His name was Julius too? A. Yes.

Q. You put in your system of bookkeeping that was down there, after he installed his cards here?

A. He had two or three other books full that he kept.

Q. All right, did you keep any books?

A. I had my little book over there in my desk. I always had.

Q. What book was that?

A. Well it was a kind of—it was what you call a ledger, it was six by eight, it was a black book—you can call it that if you want to. Burkett got

(Testimony of Julius Wild.)

a copy of one of them and I could not exactly tell you about it, but to my knowledge it was a black book. [422]

Mr. Belli: May I make a request for any books or ledgers, the Government has that were taken from Mr. Wild—ledgers, sheets, or cards, or anything like that?

(Off record discussion between counsel.)

Mr. Campbell: The record will show that there has been produced here a tan covered book—a bound book, and it is represented to me that that is the only record in the possession of the Government.

Mr. Belli: You don't have any scratch sheets or anything like that?

Mr. Campbell: This is the only record.

Mr. Belli: That is the only record, document, scratch sheet, or anything else—or writing—from the place?

Mr. Campbell: That book is the only thing we have possession of.

Mr. Belli: Q. Julius, do you know what this is? Have you seen that? I show you a book, buff-colored.

A. Yes, this is Bob Callahan's book. He would have to check the record. I had a copy of this book. They are 3 for \$1.00. They were this color or black, and I kept one of these, and these books were in my private desk—unless I went to Caliente, or something, to put in anything else that I did there, lost or gained, and I would bring it back.

(Testimony of Julius Wild.)

Q. When was the last time you saw this book, and by this book I refer to the next exhibit I will offer in evidence? [423]

A. The last time I saw that book?

Q. Yes.

A. The last time I saw that book that you have was at Mr. Burkett's office.

Q. Before that, when was the last time you saw it in or about your premises or with any of your employees? A. That book?

Q. Yes.

A. Well, after the heat was on there was no salary stuff and there was no need for Mr. Callahan keeping the book. I just got a copy of that book, my other book. That is just a sample of my book.

Q. This book indicates the salaries paid and the Social Security?

A. That's right, that is for Social Security.

Q. You paid regular Social Security, did you, on all of the employees? A. Yes.

Mr. Belli: Defendant's Exhibit next in order, into evidence, if your Honor please.

The Court: It may be marked in evidence.

(Thereupon the above mentioned book was received in evidence and marked as Defendant Exhibit L.)

Mr. Belli: Q. This other book that you kept, that you referred to, a black book or whatever it was, could you tell [424] the ladies and gentlemen of the jury a little bit more about it—the necessity

(Testimony of Julius Wild.)

of it, how it was kept? Give us a little bit on that.

Mr. Campbell: I object to the question in that form, "the necessity of it", he can describe the book but I think the foundation should be laid as to the time the record refers to. The question is general, and also calls for an exposition.

The Court: You should reframe the question, counsel.

Mr. Belli: I will.

Q. You kept this book that has been referred to here as a "black book", did you?

A. Yes, sir.

Q. You kept it yourself A. Yes, sir.

Q. In your own handwriting? A. Yes, sir.

Q. When did you start keeping that book, do you remember about what year?

A. When I kept that. I had a book like that every year in my business.

Q. Who wrote in that book?

A. In that book, Bob— If I did it, he put it down, but when Krakauer came there—I was the only one that wrote in that book. I was the only one that put the receipts and losses and gains in it, to my knowledge. [425]

Q. How did that book differ from these cards, over the period of 1941, '42 and 1943, if it did differ?

A. At the room place, and in the desk, I had a recap sheet, and I had a run-down sheet. Mr. Burkett has run-down sheet, and he has got the last day's recap sheet there.

(Testimony of Julius Wild.)

Mr. Campbell: I ask that the last be stricken, if the Court please, and the jury instructed to disregard the statement as to what Mr. Burkett has.

Mr. Belli: I will stipulate that it be stricken and ask the direct question.

The Court: Q. Has Mr. Burkett anything of that character?

(Off-the-record discussion between counsel.)

The Court: We are talking, gentlemen, at cross purposes, perhaps. The jurors are entitled to correlate this evidence, and they are entitled to know precisely what this gentleman has in mind when he refers to a black book or a run-down sheet.

Some of these sheets referred to have particular significance in racetrack parlance. These people are not racetrack technicians, so let's have definitions as we go along.

A run-down sheet has a particular significance in racetrack parlance—

Mr. Campbell: I will represent to the Court, your Honor, that the Government has none of these matters. [426]

The Court: The Government has none of the records referred to?

Mr. Campbell: None of the defendant's records other than those which have been produced here.

The Court: All right, we will accept the statement.

Mr. Belli: Q. When is the last time you saw the run-down sheet that you referred to?

(Testimony of Julius Wild.)

A. Mr. Burkett showed it to me when he showed me the recap.

Q. When was this? Take it a little slower. Remember the horse, and you won't be so talkative.

With reference to this run-down sheet, you say Mr. Burkett had it. Maybe we can get it straightened out, and know what we are talking about. When is the last time you saw it, with Mr. Burkett in the place?

A. When Mr. Fickheimer and Mr. Rogers called me up there at the Federal Building, I think on the tenth or eleventh floor, 1012 or 1110, in that room there.

Q. Do you remember what date it was?

A. No, I don't.

Q. What month was it, and what year?

A. It was in 1946. I would say it was just before—some of our relatives come for the Fourth of July, so it was the last Thursday or Friday in June of 1946.

Q. Of 1946?

A. No—yes, 1946, that is the year. [427]

Q. You say there was one run-down sheet or more than one?

A. Just one.

Q. Were there any other records there then?

A. A recap with some of my writing in it, and I showed him—I said, "This is not Snell's, this is my writing."

He told me to identify the writing. On this run-down sheet there was some bets and I said, "I think I have taken that bet myself."

(Testimony of Julius Wild.)

Mr. Campbell: Could I ask a question, your Honor? I think the matter should be cleared up.

The Court: Yes, I think so.

Mr. Campbell: Q. At the time you went to the Intelligence Unit office that you have described, you were shown certain records, were you not, which had been obtained from the San Francisco Police Department, and which had been previously taken from your place?

A. I am pretty sure they had taken them out when they were taken—I am not sure the Police Department had taken them, because I was told by somebody at that time there to get out of the place.

Q. But at that time the records you refer to were taken? A. Yes, sir.

Q. At the time these were shown to you, somebody told you these were records that had been borrowed from the Police Department? [428]

A. I asked him where he got them records from. I said, "Them is my records," and I asked him where he got them from. I said they were down there at the police raid and I am not sure whether I asked Mr. Burkett or not where he got them from because I knew——

Mr. Campbell: I will represent to the Court that the records in question have been restored to the county authorities and are in their possession.

Mr. Belli: Q. In any event, those records were there in the possession of Mr. Burkett, Mr. Rogers

(Testimony of Julius Wild.)

and Mr. Fickheimer, when you were examined, is that right? A. Yes, sir.

Q. Let's go back to the system of bookkeeping and my rather laborious question to you, which I now reframe, and that is:

You kept this other system of books yourself, or rather, you kept a black book yourself, is that right? A. I did.

Q. All right, and the last time you saw that black book was when?

A. Well, when I went down to look for an entry in it and I made some entry in it, and that was when the heat was on, and it still may have been in there when he was here. I think that was a day or two before he left, but it may have disappeared. I am not sure whether it disappeared before or after.

Mr. Campbell: I ask that the answer be stricken as not [429] responsive, and that the jury be instructed to disregard the conclusion of the witness.

The Court: The answer is stricken. The jury is instructed to disregard it.

Mr. Belli: Your Honor, just briefly may I be heard? I think the answer is responsive.

The Court: I think, Mr. Witness—may I question him?

Mr. Belli: Yes, Your Honor.

The Court: Q. You state you had the book in your desk? A. Yes.

Q. Where in your desk?

(Testimony of Julius Wild.)

A. It was about—in the bottom drawer, on the right hand.

Q. And when, to the best of your recollection, did you last see the black book in your desk?

A. When the raid was on, when I went down there, everything was gone—after the raid, everything was gone.

Q. After the raid everything was gone?

A. That is when I looked for that book, and I tried high and low to find it, and it was not there.

The Court: All right. Now, may we have the date?

Mr. Campbell: We don't have the time of the reported raid. There has been evidence here that there were a number of raids during the period. I don't know.

Mr. Belli: We will ask about it, so we will have it in the record, but also may I ask how many raids were there while [430] you were there?

A. To my knowledge there must have been twenty in them three years, between twelve—they come pretty often. I would say every two months or so.

Q. With reference to the raids, which raid was it, in point of time, that you fixed in answer to His Honor's question, as the time after which you did not see the black book? Do you remember the month or the year?

A. No, I don't.

Q. Well, how long was it before or after Mr. Krakauer's leaving?

A. Well, that book was there—when the heat

(Testimony of Julius Wild.)

was on it was there. I had no use for it, because I had everything down—there was no profit at all, it was all a total loss, and I did not have no need for the book. When I did look for it, it was gone.

Q. Let's go back to the question again: When **was it that you did** look for it, with reference to the time that Mr. Krakauer left? Was it before or after, or about then or when, so we can get, if possible, some month and some year as to the last time that you saw the book there, that you have a recollection of seeing it there?

A. It is hard for me to answer that, because I really don't know when I did look for that book. I could not tell the date.

Q. Did you give Mr. Krakauer access to that book? [431]

A. Mr. Krakauer had access to everything.

Q. Did Mr. Krakauer himself write in that book? A. No, not to my knowledge.

Q. All right. Let's see if we can get this: Did that book have any of the figures in it that are on these cards here, Exhibit 8, 7 and 9?

A. That book had the results, official, of the weekly cards that he gave me.

Q. Did that book have that record of the play in the other room, in it?

A. That was the most important part of it. We had that other play in there, and that is when I deducted this business from that business.

Q. Without going into elaborate detail, let's go into this other business. Do all bookies have two

(Testimony of Julius Wild.)

rooms or two types of business, one over the counter, and another one in a little bit more formal surroundings?

Mr. Campbell: Object to that as incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Belli: Q. With reference to your bookie business, you booked people who came in over the counter and you had business from other runners, and brokerage houses with their runners, didn't you? A. Every day. [432]

Q. Can you tell the ladies and gentlemen of the jury, in your own language, how this runner business and your telephone business operated, in your booking establishment?

A. Yes. When that business started in the morning you put up your prices on your run-down sheet, where it says, "Start, Place and Show."

Q. Take it a little easy. When you are talking about run-down sheets, what is a run down sheet?

A. The run-down sheet has the horse's name on it, and his name, and in front of that it says, "Start, Place and Show." Then I would have the runner on the street, and when the prices had settled, he phoned them in to me, the street prices that the bookie had put on it.

Q. How would the runner on the street determine how the price was settled?

A. When the Dixon Club or the big clubs would put it up, that would be the rate card for all of them.

(Testimony of Julius Wild.)

Q. Then you would conclude that the prices were settled for that day, and you would put that down on the run-down sheet? A. Yes.

Q. That would be something like marking on the board at the Stock Exchange what today's prices are?

A. The same. The only thing is, one is for small operators and the other is for big, and in the long run they break you.

Q. By the way, while we are on that, the witness that we put [433] on this morning, Mr. Sammut, did you know him?

A. I done business with him every day.

Q. What is his nickname?

A. His name is Artichoke Joe.

Q. How long had you known him, the man who said he had never seen you before?

A. Only 17 years.

Q. We have got the odds fixed for the day on the run-down sheet. Then what happens after that?

A. After that, then your runners—every book as a runner, the same as the Stock Exchange, every book has a runner.

Then if there was a commission waiting to be bet on a horse at the price——

Q. What do you mean?

A. There might be \$500 or \$1000 at the Dixon Club, or \$500 or \$1000 at any of those clubs.

Q. You mean a syndicate or a pool?

A. No, that would be sent from Chicago, or maybe from Reno. That would be waiting to be set at the price.

(Testimony of Julius Wild.)

Now, the runner would come in and say, "Julius, can you stand \$20 on that horse at ten to one," and I would say, "Which one is it," and he would tell me, "The second horse, No. 64."

That is just a sample. I would say, "Wait a minute," and I would go on my racing form and—I made my own prices, too—put the prices down, and if I had that horse at 15 to 1, I [434] would say, "Brother, you are on."

Q. Julius, can you tell us how you lost in the room, if you are a pretty good price maker?

Mr. Campbell: That is objected to as assuming a fact not in evidence.

Mr. Belli: We will ask it this way:

Q. Did you lose in the room?

A. You had to lose in the room because I gambled with some of it and I bet every day of my life.

Q. How could you lose, then, in the room if you were a good handicapper and price maker?

Mr. Campbell: Object to that as argumentative.

The Court: Overruled.

A. You can not book and bet and beat the races.

Q. Is that what you attribute your losses in the room solely to, or was there any other reason?

A. There was a tremendous lot of leakage in our room.

Q. How do you mean that?

A. Shortages that I never could get.

Q. Did you do a bigger volume business, in the

(Testimony of Julius Wild.)

room only, you and Bob Hughes, than you did in the room when Mr. Krakauer was there?

A. Some days it would be bigger, but on the average my pad was always a bigger business. The layouts was on the—the runners' money was on there. I would get that out of the other [435] book, so I would take the fall.

The other book I wanted to be a conservative and steady thing because I had a line that you could make your salary and living out of, without going to the other one.

Q. Can you tell us anything more about the book on the inside room in which you were in?

After you would take the bets there, of course then you would wait and get the results of the races, is that right?

A. Well, that is natural, but in the meantime I might send Bob or Rosie or whoever was around, out to see if he could not get it for me, too.

If I only had that horse six to one, I refused to bet. Then if I could get ten to one, I would give him five or ten and say, "Go out and get me a bet down on the horse."

I would want that to work on in my room. In other words, I wanted that for a foundation.

Q. Well, you do no other betting than that, or no other rejection than that?

A. Well, I would bet.

Q. Where would you bet yourself?

A. Everywhere. I had credit everywhere—Artichoke Joe and every place.

(Testimony of Julius Wild.)

Q. Is that where you placed most of your bets, with Mr. Sammut, who did not know you?

A. No, not all of them. [436]

Q. At any event, when you came to the end of the day, you would pay off or you would win, is that it?

A. Well, win or lose; I would win or lose.

Q. What would you do at the end of the day? How would these people be paid? Would they be paid that night or the next day or how?

A. They would be paid from race to race. You mean the runners?

Q. The runners.

A. Most of them would come back. Half of them would come back that afternoon, if they had another play for the afternoon track, and half of them, if they did not have another play, would come back in the morning first thing.

Q. Did you keep a bank account in the Wells Fargo or American Trust, and pay off in cashier's checks or certified checks, or how do you pay?

A. No, it would be mostly all cash.

Q. Where would you keep the cash?

A. In my pocket. I always kept \$1200 or \$1500, but it fluctuated, just like any business did. It all depended on how it was going.

Q. Do you know the custom amongst bookies with reference to paying, whether they all paid by cash or check or how? Yow can answer that yes or no.

Mr. Campbell: Just a minute. Object to that as incompetent, irrelevant and immaterial. [437]

(Testimony of Julius Wild.)

The Court: The objection is sustained. I presume it goes without argument that all these transactions were always cash. You are not disputing that, are you, counsel?

Mr. Campbell: No, it is simply the line or the custom.

Mr. Belli: That takes us through a busy day at the bookie establishment, from the time that you make the morning odds, on up until the payoff at the end of the day, is that right?

A. That's true.

Q. Then at the end of the day you figure up in the black book how much you had won or lost in each of the rooms, and computed it?

A. I did.

Q. Now, with reference to the black book itself, do you recall someone coming from the Government and asking you for some records to substantiate your returns?

A. Yes, I do.

Q. Mr. Callahan made your returns, didn't he?

A. For some years, yes.

Q. When you had the black book, you did not take it to the Government, did you?

A. I did not.

Q. Why didn't you take it to the Government?

A. Well, I will tell you why I didn't; there was a lot of personal things in there. There was Charlie Howard's private [438] telephone and Bing Crosby's private telephone——

Mr. Belli: Don't mention any names. If you can give a reason—you are not asked for names.

(Testimony of Julius Wild.)

A. This is all personal. The reason I done that was, that when they run a horse, or anything that I liked, I would phone them or wire them to have a bet on it, which is done quite often, not for no gain or anything, just for friendship.

Q. Do you recall the incident of Mr. Krakauer preparing twelve cards that were taken by the Government? A. I do.

Q. Tell us all about that.

A. Well, Mr. Lippert, if he was here,—I was not so sure that the man was on the stand—when he came, he said, “I want a better record that I can work on. I want it down in my office tomorrow.”

So I said, “Krakauer, this man is from the Government office,” when he left, and I said, “He wants a better system—he wants a better system out of it than I can give him.” So I said, “I will give him my book and if he has to have—you know, a division by the months or so, he would have to copy it out of my books.”

Q. Did Mr. Callahan prepare any cards or give any figures to Mr. Krakauer?

A. He was not even there. I left it under his choice how to do it. He was not even there. [439]

Q. Where did Mr. Krakauer get the figures to put on the 12 cards?

A. He might have gotten some of them out of his cards. When I went upstairs I had my supper, and I came on back, and the next day Mr. Krakauer had the tickets all made for me, and the next day Callahan went down.

(Testimony of Julius Wild.)

Q. They were in Mr. Krakauer's handwriting?

A. Every bit of it.

Q. And they were brought up to the Government, is that right?

A. That's right, to Mr. Lippert's office.

Q. When was the last time you saw those twelve cards?

A. I don't think I ever saw them until I went up to Mr. Lippert's office.

Q. And did anything appear in Dr. Shornick's account, win or lose, in any cards like this?

A. No, not in that, but when I looked at those tickets, there is a lot of those tickets that don't belong in there. There is a lot of Krakauer's personal affairs in there, and I pointed them out to Burkett. I said, "This ticket don't belong to me, and this one don't belong to my business."

Q. Will you, during the noon recess, go through 7, 8 and 9, and try and find that which you refer to that you say are Krakauer's personal cards and don't belong in here? Will you do that?

A. I will. [440]

Q. Coming back now to Dr. Shornick, will you tell us how the account was established, whether you won or lost or what happened?

A. Well, Dr. Shornick came here and he says, "I will leave you \$2,000 or \$2500 deposit."

This was after one of the big races down at Santa Anita, and I really needed cash, so I thought to myself, "I will take this fellow on," after he showed me the system, what he wanted, you know, and

(Testimony of Julius Wild.)

figuring on that \$2500, that I did not have to pay him until the end of the month, as we decided on settling every once a week or once a month.

So at that time I really needed the cash to operate, so we were taking him on.

So he gave Mr. Krakauer his name and address. So his bets were all \$200 flat bets on horses, 6 to 5 or less, to place, no matter where they raced, on any racetrack, and we had a special chart in the daily racing form.

Q. Did Mr. Krakauer keep Dr. Shornick's account? A. He certainly did.

Q. Did he play Dr. Shornick's system, if you know? A. That I am not sure.

Q. By the way, did Mr. Krakauer bet, to your knowledge, in the establishment or out of it?

Mr. Campbell: May I have that question repeated?

(Question read by the Reporter.) [441]

The Witness: I begged all my boys not to bet, every one of them.

Mr. Campbell: I ask that that be stricken as not responsive.

The Court: Motion granted.

Mr. Belli: Q. Did Mr. Krakauer bet, to your knowledge?

A. Every day of his life, when he was in my book.

Mr. Belli: All right. May we take the recess, Your Honor?

(Whereupon after the admonition to the jury by the Court, an adjournment was taken until 2:00 o'clock p.m. of the same day.) [442]

Afternoon Session, August 17, 1948, 2:00 p.m.

The Court: The jurors are present. You may proceed, gentlemen.

JULIUS WILD

recalled; previously sworn.

Direct Examination (Resumed)

Mr. Belli: Q. Mr. Wild, there is one thing I overlooked here with reference to Mr. Sammut, or Artichoke Joe, as you prefer: Do you owe him any money at the present time?

A. I owe him one thousand dollars.

Q. That dates from when?

A. That dates to about 1942. Well, I would say either 1942——

The Court: Pardon me, Mr. Belli, he is the gentleman you referred to——?

Mr. Belli: The first witness this morning.

The Court: The first witness this morning, yes.

The Witness: Yes.

The Court: Q. He said he did not know you, and had never met you, nor had ever seen you.

A. Yes.

Q. And he looked right at you?

A. He wouldn't look at me.

Q. You owe that man a thousand dollars? [443]

A. I do.

(Testimony of Julius Wild.)

Mr. Belli: I think we will have some substantiation of that, your Honor.

Q. With reference to security, what did you give him for security on that, Mr. Wild?

A. I gave him either the ring and the watch or the ring alone.

Q. And when did you get them back, or did you get them back?

A. I don't know, he called me up and says, "Come down and get your stuff. I am in a jam." I said, "I ain't got the money." He says, "Pay me when you can."

Q. I think we went into a little of this Dr. Shornick matter, or we started to before the recess, but we can go through that rather briefly: Did you handle the account, yourself, or who handled it, Julius?

A. Mr. Krakauer.

Q. And do you know how much was lost or won on Dr. Shornick?

A. Well, we lost about, between three and four thousand.

Q. The diamond ring: Did you have a diamond ring or any diamond you purchased during the period 1941 to '43 inclusive?

Mr. Campbell: I object to that question in that form.

Mr. Belli: Withdraw it.

Q. Did you buy any diamonds, Julius, between '41 and '43, inclusive?

A. It is hard to say whether I bought them. I took them for security on bets and when they

(Testimony of Julius Wild.)

couldn't redeem them or says, [444] "Julius, I can't go no farther," if you call that buying, that is all right.

Q. Well, did you get any diamond in 1941, '42, or '43?

A. I pretty near got diamonds in every year of my booking business.

Q. Between '41 and '43, or did you end up at the end of 1943 with or without diamonds?

A. I think I bought one in between.

Q. What kind of a diamond?

A. I would say it would be about 2 karat.

Q. How much would that be worth?

Mr. Campbell: That's objected to. Its worth is what he paid for it.

Mr. Belli: Q. What did you pay for it? That is fair enough.

A. I think I paid eight hundred, and I borrowed that much on it, so that is one time.

Q. All right, any others besides that one?

A. And I haven't redeemed that.

Q. Where is that?

A. At Maxferd's, or it was.

Q. When you came out here with your wife in the early years did you have some diamonds?

A. I am pretty sure I had three uncut stones. They were diamonds.

Q. What was the origin of those? [445]

Mr. Campbell: Objected to as immaterial. It is too remote.

The Court: It is remote, but I will allow it.

(Testimony of Julius Wild.)

Mr. Belli: Q. Where did you get those? Did you buy them, or were they given to you, or what?

A. I was paid off in diamonds from agents of the Mexican Revolutions. They hatched all the Mexican revolutions in my backyard, or back bar, in a private room, and paid the Government for their horses and mules in gold, and I acted as agent, and if they had no money they would give me a diamond stone for delivering the money.

Q. Did you have those in 1941?

A. No, I had those when I came out here.

Q. Did you have them in 1941, or by 1941?

A. Well, that is hard to answer, Mr. Belli—I don't remember.

Q. Did you have them in 1942 or 1943?

A. I did have one of them and Mrs. Wild, I gave her one of them, and the other one I sold, but I have had a lot of them in between times.

Q. You were going into this this morning, and there may be some confusion on this: You told me this morning on these cards, and you have had a chance to look over them, the Exhibits 9, 8 and 7, and you told us something this morning with reference to these, that there were some cards in here that were not your cards. [446]

A. Not pertaining to my business.

Q. Did you look through here in the noon recess to see if you could find them? A. I did.

Q. Are they in here? A. No.

Q. When was the last time that you saw those cards in there?

(Testimony of Julius Wild.)

A. Well, Mr. Burkett and Mr. Fickheimer and Mr. Rogers—I picked them out, about half a dozen, and I said, “This is some of Krakauer’s business. It might have been his bets, and he forgot to take them;” but it was not very important—but it was important that they were not mine.

Q. They were Mr. Krakauer’s that were in with these? A. Yes.

Q. And those are not in there now?

A. No.

Q. Those are not in the computation?

A. They are not there.

Q. With reference to the income tax returns, the exhibits here for 1941, ’42 and ’43, you signed those returns, did you, Mr. Wild? A. I did.

Q. And when you went up to the Government, then, you went with Mr. Callahan, did you, with the twelve cards that were supposed to be the 1941 amount of profit and loss? [447]

A. I don’t know what year it was, but I went up with the cards. I went with Mr. Callahan and Mr. Callahan had the cards. Krahauer turned them over to him.

Q. Then you also had when you went up there, or Mr. Callahan also had these yellow work sheets when he went up there?

Mr. Campbell: So there will be no misunderstanding, Mr. Belli, those refer to 1942 and 1943, and not to 1941.

Mr. Belli: Yes, the cards refer to 1941 and the sheets refer to ’42 and ’43.

(Testimony of Julius Wild.)

Q. All of these things you had when you went up to the Government?

A. That's right, with him. He had these cards, and I think he had his book with him, that Social Security book. Well, I really can't remember what else he had.

Q. Julius, at this time, or any time, did you attempt to or intend to cheat the Government, or attempt to evade the payment of any income taxes?

A. I did not.

Q. With reference to the expenses going down to Tijuana, and that I think we have covered, but just to be sure, did you keep those expenses in the black book or keep a total or estimates?

A. Well, some were and some were not. I was not so exact with that.

Q. Now, here is our Exhibit F for Identification indicating United Air Line Transportation, apparently to San Diego. Would [448] this refresh your memory as to the number of trips you took in 1941 and '42, or could you tell us without looking at this how many times you went down in '41 and '42?

A. Well, you see, I was supposed to be there every Sunday. My duty was there every Sunday. I was in partners with the Association. We were fifty-fifty and I was supposed to have a deposit up of five thousand, and I didn't have to have it, and they just okayed me. Judge Schilling and Walter Mori says, "Okay, Julius. If you fall back or behind we will draw on you." So you see those

(Testimony of Julius Wild.)

checks. So when the weather was bad or anything and I possibly couldn't make it, I would let "Green Tie" run my book. He was my clerk on the stand with me. He was the one that put up the chalk prices, the even money, the six to two, and five to two——

Q. Julius, you have done everything but answer the question.

A. I was trying to tell you when the weather was all right and I could make it and get transportation I would go down, and that was very often.

Q. Could you tell us what "very often" is? How many times, or do you have any idea how many times you went down?

Mr. Campbell: I have no objection to your showing him this, if he says he went on each occasion.

Mr. Belli: All right.

Q. Does this give you a pretty good idea of how many occasions you went down there? Did you go more than that or less than that? [449]

A. Well, this looks like about 25 weeks. As a rough guess, I assure you I went down there that many times because I would go down to Belmont when I couldn't make that, and I would go down.

Q. How would you go down?

A. By plane, and if there were two or three that wanted to go it was pro-rated, and if there was only me they would charge me \$75 or \$80 if they had air express to take down.

Q. Did you go down with Bob Hughes many times?

(Testimony of Julius Wild.)

A. I went down with Bob Hughes many times when the planes were grounded when I would ask him to drive me down.

Q. Julius, so we may have this for the record, you have a natural tremor there of shaking your hand. How long have you had that?

A. Ever since I quit riding the races. I have had all my bones, pretty near, broke, but they have healed up, naturally.

Q. How about your horses: In 1941, '42 and '43 did you have any horses during those years?

A. I had Silent Julie and his mother.

Mr. Campbell: What was that?

Mr. Belli: He said he had Silent Julie and his mother.

The Witness: And I got her from Mrs. Isabelle Dobbs Sloan.

Q. Did you buy any horses from Mr. Crosby during that period of time?

A. Yes, during '41 or '42 or '43 I bought a two-year old. [450] That was in 1941 I bought the two-year-old off of him, named after a town in Washington. I will think of the name in a minute or second. The name was Wenatchee; and before that I had Skookum Chuck. She was a success, but Wenatchee was washed out. I asked him how much he wanted for Wenatchee, running at Santa Anita, and I saw the horse had possibilities and I says, "Bing, how much do you want for that?" [450-a]

Mr. Campbell: I object to all of this, if the

(Testimony of Julius Wild.)

Court please. I submit this is not in response to any question.

Mr. Belli: I assume the best way is to let him run along and then we can get the answer somewhere.

The Court: I have no objection to him continuing.

The Witness (Continuing): I says, "Bing, how much do you want for this horse?", and he put up two fingers there, and that is two thousand dollar bills to him.

Mr. Campbell: Let the record show the witness put two fingers up to his cheek.

The Witness: Yes. And he took his pipe out of his mouth and that is what he done. But this horse broke down for me, and for a year he was just a total expense. So when I saw Lindsay Howard, he says, "We will replace that horse for you," and usually, if you are a good horseman, you will do that.

Mr. Belli: Q. Julius, you are going to have us all horse breeders.

A. I am just trying to explain my case.

Q. If you will wait a moment, I will try and slip in a question. There was an exhibit here some place which said you had given up your horses. Here is a letter saying you had given up the horses in 1941. Did you read that?

A. Yes, I read that.

Q. Tell us what that is.

(Testimony of Julius Wild.)

A. This is on account of Mr. Fitzgerald and I, we were in [451] partners.

Q. And Mr. Fitzgerald was the trainer?

A. He was the trainer, and a man I galloped horses for when I was a kid. So the Social Security question came up and I said, "You take over the horses and put it on your list." That is the only reason I done this. In other words, when he would run short of money, he would still send for some money and I still had interest.

Q. That may be clear to you, but it still is not to me. Do you have the horses?

A. Yes, I had half interest in them.

Q. Which horses? A. Silent Julie.

Q. And what other horses?

A. That is all. I didn't have Wenatchee. He was already broke down. And I had his mother on the farm here at Norman Church's in Santa Clara—San Jose.

Q. With reference to the winter book, Julius, and I don't want you to educate us to the point that we understand all of the details of the racing or the booking business, but just give us a fair run-over here of what you mean by this winter book and what you did, and if you lost or if you won, and will you be as specific as you can on dates, places and so forth—and I am only concerned with the years 1941 to '43.

A. In my time I always had a future book on the Kentucky [452] Derby—no, I mean the Santa Anita

(Testimony of Julius Wild.)

Handicap; not the Santa Anita Derby, but the Santa Anita Handicap.

Q. What does that mean?

A. That means you pay or play. In other words, you give them inviting odds. They pay if they run; but if the horse is scratched, you lose your money. If he does not run, you lose.

Q. You mean if the money was put up with you and the horse didn't run the bettor would lose that much?

A. Yes, the bettor took those chances. It says right on the winter book, it says, "Pay or play." That is what winter book or any future book means.

Q. How about any winter books you had as to whether you lost or won anything on them?

A. You can't beat a winter book. The only thing a winter book does is make for a lot of players to come down. It is good business; it is good advertising. It creates interest and people that only bet once a year or so will come down and make the winter book bet on account of the attractive odds **because they are advertised** in all the papers—"the future book," it says. Then when they come to your place and if they make the bet, they look at your odds and they might make another bet or two. And after the winter book, if he wins he collects, and if he loses you might not see him again until for another winter book—no, not winter book, but a future book.

Q. Julius, tell us if there were any banks or safe deposit [453] boxes or any places where we could

(Testimony of Julius Wild.)

check, or where there would be any record if you had any accounts in '41, '42 and '43, inclusive.

A. The only bank that I dealt with, to my knowledge, in 1941, '42 and '43 was right at this bank in the Whitcomb Hotel, the American Trust.

Q. What was the highest amount of the balance in those years?

A. The highest amount of the balance? It is hard for me to tell you.

Mr. Belli: Do you gentlemen have a witness on that?

Mr. Campbell: I think the records are here.

Mr. Belli: Well, we will have that then and we won't have to guess on that.

Q. About the loans at Maxferd's and the Morris Plan, with reference to the Morris Plan and Maxferd's, did the witnesses that were here and the records they left bespeak the fact of the amounts of loans you had there?

Mr. Campbell: I object to that. They are the best evidence.

Mr. Belli: Well, that is objectionable.

The Court: Objection sustained.

Mr. Belli: There is one witness we call back on the record and I can show it to counsel. I think we might clear it up now.

You may cross examine. [454]

Cross Examination

Mr. Campbell: Q. Mr. Wild, you have been in this horse race business for how long?

(Testimony of Julius Wild.)

A. Since I was 13 years old—some 48 years.

Q. 48 years? A. Yes, sir.

Q. When did you open up your place of business there below the Orpheum at 1182 Market Street?

A. Well, I was there two or three times. I moved out and moved in again.

Q. Were you there throughout the time 1941, '2, and '3? A. Yes, sir.

Q. And you continued to operate, did you not, until approximately September of 1944, when the big raid you referred to took place, is that right?

A. What do you mean by the big raid?

Q. Well, you continued to operate until September, 1944, did you not? A. That's right.

Q. And it was at that time in the raid you referred to that certain of the records were taken, is that right, at that time? A. Yes, sir.

Q. That was in September of 1944?

A. Yes, sir.

Q. That was the occasion when one of your employees was arrested [455] or taken in custody, Mr. Snell? A. Yes, sir.

Q. So that after Krakauer left in September of 1943 you continued to operate your place of business for October, November and December of 1943, is that right?

A. I am pretty sure that's right.

Q. Now, in order that we may understand your layout there, and there has been some description here of a front room and a back room. Actually,

(Testimony of Julius Wild.)

the so-called front room opened directly into the back room, did it not, without a door intervening? There was an archway between the two places, is that right? A. That's right.

Q. And how wide was that archway?

A. I don't know how wide that archway was.

Q. As a matter of fact, more than half the space between the two walls was taken up by that archway, wasn't it?

A. No, I think about one-third.

Q. About a third?

A. The hatchway was about one-third the size from the right, and they were about one-third—there were three-thirds, and the hatchway was one-third.

Q. About one-third of the width of the room was taken up with a hatchway?

A. It is just like those three panels. The hatchway was in [456] the center and there was the same amount of space on each side.

Q. Just like the three panels in the back of the courtroom? A. That's right, yes.

Q. How far was it from the counter? You had a counter in the front room, did you not?

A. Yes.

Q. That was across the width of the room?

A. Yes.

Q. That is where the people who were accepting the bets, the clerks, cashiers and so on were? They were behind that counter, weren't they?

A. Yes.

(Testimony of Julius Wild.)

Q. Now, how far was it from this counter to the partition of which the archway was a part?

A. A hop, skip and a jump, about ten or twelve feet.

Q. About ten or twelve feet?

A. That's all.

Q. Your desk was immediately, or right at this archway, was it not?

A. No, Mr. Krakauer's desk was at the archway. My desk was when you hit the first panel. The first panel came, and then the archway. I was right up against the first panel.

Q. You were right up against the first panel?

A. Yes, because there was a door that opened in the back that led right in to my desk. [457]

Q. So your desk was about twelve feet from the counter, is that right?

A. About ten or twelve feet.

Q. Ten or twelve feet from the counter?

A. Maybe more or less, I don't know.

Q. All right, and when we say the counter we are referring to where the cashiers and clerks were standing to do their work, is that right, and there was a phone on your desk, is that right?

A. Sometimes two?

Q. Sometimes two? A. Yes.

Q. Were those the only phones in the place?

A. Yes, we had a loudspeaker there, though.

Q. But I am talking about telephones for outside communications. A. Two.

Q. You had a loudspeaker from which the race

(Testimony of Julius Wild.)

broadcasts were made, is that right? A. Yes.

Q. And the odds were announced, is that right?

A. And the results announced. First came the results, then the odds, and then the "official."

Q. There would also be a description of the race as it was run? A. At times.

Q. From whom did you obtain that service?

A. From the service people.

Q. What were their names?

Mr. Belli: Just a moment, that is objected to.

The Witness: The service people.

Mr. Belli: Just a moment, please, Mr. Wild. I object to that.

The Court: What is the materiality of that?

Mr. Campbell: I think——

Mr. Belli (Interrupting): That might, I think, involve a collateral matter.

The Court: What is the purpose of this?

Mr. Campbell: I am trying to show the authenticity of the records.

Mr. Belli: Your Honor can perceive this matter and what is involved, what would be involved, namely, a myriad of collateral crimes in the book-making business, and that would be both intrastate and interstate with reference to any wire that was maintained.

Mr. Campbell: I don't know what the last statement has to do with the controversy here. We are trying to ascertain his income and his expenses.

The Court: The witness on the stand, the de-

(Testimony of Julius Wild.)

fendant, in fact, has made a deduction based upon the service, according to Mr. Campbell.

Mr. Campbell: That's correct. [459]

The Court: I think you are entitled to go into that.

Mr. Belli: He is not, if your Honor please. In order to do that, in order to identify the services, he would be going into collateral crimes of purchasing wire service interstate, and as I understand, it would be a collateral crime that he would be charged with.

Mr. Campbell: I don't know as to that, but certainly it is testing the accuracy of the witness and his right to make these deductions. The only way we can test these matters is to go into from whom he received the service as well as the amount which he paid. You certainly can't go through the trial with X, Y and Z. [460] We certainly can not go through the trial referring to an X-93.

Mr. Belli: Do I understand he is being given immunity with reference to any crimes that may come into the jurisdiction of this Court for having received information on horse racing in interstate commerce?

Mr. Campbell: No, sir; that is, not so far as I am concerned, he is not being given immunity. He has a right to claim any privilege he is entitled to, but he is here on trial on various specific issues which have been placed in issue before this Court.

Mr. Belli: I don't think I have ever done this before, but at this time, if Your Honor please, I

(Testimony of Julius Wild.)

shall advise the witness to claim a constitutional privilege, that any answer he may give as to who these people were, from whom he got any wire service information in gambling, would tend to incriminate or may tend to degrade him, and may subject him to other crimes, not only before this tribunal but before the tribunal of the State Court.

I don't think the statute of limitations——

The Court (Interrupting): You accordingly admonish him not to answer?

Mr. Belli: In all due respect to Your Honor, yes, and I know that Your Honor understands in all humility that I do instruct the witness not to answer. [461]

The Court: I think on the advice of counsel, Mr. Wild, I would suggest you refuse to answer the question put to you, and under the circumstances you may feel free to refuse and decline to answer that question.

Mr. Campbell: May I suggest——

Mr. Belli: I do instruct the witness, under the circumstances—that is my advice, Your Honor, in open court, that he has the privilege to accept his lawyer's advice or to act as the dictates of his conscience advises him.

Mr. Campbell: May I suggest, Your Honor, that the admonition of counsel is not pertinent in one respect, in which the witness has been admonished, namely, that he may refuse to answer on the ground the question may incriminate him under the state statute or the state law.

The Court: That it would tend to degrade him.

(Testimony of Julius Wild.)

Mr. Campbell: But the incrimination under the state law is not a ground of immunity.

Mr. Belli: I think the record is clear that he has referred to grounds for immunity due to the possibility or probability of prosecution both in the state and federal courts.

Mr. Campbell: Q. What was the name of the service? A. I refuse to answer.

Mr. Belli: Just a minute——

The Court: You decline to answer, do you, Mr. Wild?

A. I do. [462]

Mr. Campbell: If the Court please, for the purpose of the record, may I have a statement from the witness of the grounds upon which he declines to answer?

Q. Upon what grounds do you refuse to answer?

Mr. Belli: May I then advise the witness in open court, not being learned in the intricacies of law, that he may at this stage of the proceedings, stand upon his United States constitutional right to refuse to answer any question which may tend to incriminate or degrade him, and if the witness so desires he may choose the words of his counsel in answering counsel for the Government's question.

Mr. Campbell: Q. Mr. Wild, upon what grounds do you decline to answer the question, from whom you obtained this service?

Mr. Belli: And further, if I may in open court advise my client, that he may rely upon constitutional grounds, that the answer he may give may,

(Testimony of Julius Wild.)

tend to subject him to criminal prosecution in federal court, in interstate commerce, for receiving information on gambling or horseracing, therefore he may decline to answer on constitutional grounds, that the answer may tend to incriminate him in the federal court. He may accept my answer without reframing it in his own words.

Mr. Campbell: Do you accept counsel's answer as the grounds upon which you refuse to answer that question?

A. I do. [463]

Q. You have referred to the class of service. What expenses did you pay a month for that service?

A. A month? I paid it by the week.

Q. How much a week did you pay?

A. Sometimes \$25, sometimes \$30.

Q. How much a week did you pay in 1941?

A. I don't know. It was one or two figures.

Q. To whom did you pay that money in 1941, what individual?

A. To the service, the collector.

Q. To what individual did you pay it?

A. I don't know the individual.

Mr. Belli: May I respectfully—this is rather unusual, interjecting in this matter, and I mean no disrespect, as Your Honor knows, to either the Court or counsel. Yet I claim the privilege of advising him in open Court that you may stand on your Constitutional grounds, in answering the counsel's questions, if you so desire to do. You are privileged to speak to your own counsel to answer

(Testimony of Julius Wild.)

if you so desire. My advice now is that you need not answer under a Constitutional guarantee.

Mr. Campbell: Q. Will you answer the question? A. I will not.

Q. On the grounds stated by your counsel?

A. Yes, sir.

Q. Did the service you refer to continue throughout the year [464] for 1941, 1942 and 1943?

A. If I was doing business in those years, yes.

Q. Were you doing business in those years?

A. I was, outside of two months.

Q. That was in April and May of 1941?

A. If the cards show, yes.

Q. That is correct, the cards are all correct in that regard, is that right?

A. If the cards are correct—not 1943 now. That did not go all the way through 1943. You said 1941, 1942, and 1943, it did not go all the way.

Q. The service, you refer to? A. Yes.

Q. What portion of the time did you not pay for the service?

A. Please, will you repeat that?

Q. For what period of time in 1941, 1942, or 1943, did you have no expense or were paying no one in connection with service to the wire service?

A. I cannot answer. I may have been out of town, but the cards all refer to the months that I was here.

Q. That is what I was asking about. Were the cards all accurate in respect to that payment? Did

(Testimony of Julius Wild.)

they tell the truth, the cards, with the amount^t of money that you paid for that service?

A. Well, they should tell the truth. [465]

Q. Do they? You have examined them, haven't you, Mr. Wild?

A. I have not seen that expense on there at all. I did not look at that. All I am referring to is the cards. If I saw the phone bill, I paid it, the expense that was there. As a rule, you see "service" on there. They show three weeks on them cards we did not receive service, they put down for services, but that does not pay the service.

Q. You received a similar card or one of these cards every Saturday night, did you not, Mr. Wild?

A. When I was here, yes.

Q. You were here all of the time, in those years?

A. We would leave sometimes before the Saturday—before it was half over I would leave at one o'clock.

Q. Your Saturday business, except when Local tracks were running, was over by that time, wasn't it?

A. Not necessarily. At one o'clock it was all over here, but at three or four o'clock it run at Charleston, and then it run until five o'clock—

Q. Five o'clock their time?

A. If that was a big day, or four o'clock, by the time we got it and traced it out and everything.

Q. On how many occasions was that?

A. Every year, every time they run.

Q. What months?

(Testimony of Julius Wild.)

A. That I am not sure, because I don't know.

Q. You have gone through these record cards, though, have you not?

A. I glanced through them.

Q. Can you state that the expenses set forth on here for wire service are not correct?

A. Can I state that?

Q. Yes, can you state that they are not correct, that they are incorrect, that they are wrong?

A. It is hard for me to answer that.

Q. Do you know? A. Do I know?

Q. Yes. A. That they are wrong?

Q. Yes, as to this expense of wire service.

A. I could not say that I know they were wrong, because I did not expect them that close. This is the first time you throw "service" at me. I did not look for any service on there.

Q. How was this \$25 or \$35 paid, by cash or check? A. Cash.

Q. Did you deliver it to some one or was the money picked up in your place of business?

A. It was picked up.

Q. Was it on any particular day of the week?

A. Not necessarily. [467]

Q. Was that an expense item that you personally took care of, or did any of your employees pay that money over?

A. I was not there, anyone would pay that.

Q. By anyone, who do you refer to?

A. Mr. Hughes, Mr. Collard, and Mr. Krakauer.

Q. Did you handle the payments for yourself

(Testimony of Julius Wild.)

most of the time? A. I don't know.

Q. Were you acquainted with the individual who picked it up?

Mr. Belli: The same objection and the same advice.

Mr. Campbell: Q. You refuse to answer that question too? A. Yes.

Mr. Belli: Just for the sake of the record, he does.

Mr. Campbell: Q. And upon advice of your counsel? A. I do.

Q. As I recall your testimony, you received one of these cards, or a duplicate of these cards, each Saturday night that you were here, is that right?

A. That's right.

Q. And you are familiar with the matters set forth on these cards? A. Sure I am.

Q. You examined the cards during the recess?

A. I just went through them.

Mr. Campbell: Some of these have become disarranged and disassociated. [468]

(Off record discussion to the Clerk.)

The Court: Your examination—so the jury will understand you—was in the presence of the Clerk.

The Witness: It was.

The Court: And you were not at any time with the cards except in the presence of the Clerk?

A. That is correct.

The Clerk: I showed some of them myself, Your Honor.

Mr. Campbell: I am missing Card number 1 of

(Testimony of Julius Wild.)

Exhibit 7, and I wonder if the Clerk could examine the record and see if there has been disassociation.

Q. I will show you in the meanwhile a photostat of that particular card, one of the photostats of Government Exhibit Number 10 for identification, that has been identified as a photostatic reproduction of Card number 1 of Government Exhibit 7, the card.

Are you familiar with the nature of the entries made on that card? You can answer that yes or no, Mr. Wild, if you will, please.

A. What is the question?

Q. Are you familiar with the entries made on the card—not exact amounts, but the nature of the entries, the kind of entries which are made there?

A. They look all right.

Q. Well, turn to the back of the card. [469]

A. Maybe this is a little wrong, but I cannot tell you what this is, but I do know that this card was O.K. (indicating) but the two bottom cards, I don't know if anyone can tell us that. You give me the wrong side of the card, anyway.

Q. There are two sides, are there not?

A. The card I got, I only got one side.

Mr. Belli: Just a moment, he gave you the whole card. He did not give you any particular side.

Mr. Campbell: Q. Will you look on both of these? You are familiar with these cards, aren't you, what is set forth there?

A. Well, I can read to you what I am familiar with.

(Testimony of Julius Wild.)

Q. No, I am asking if generally you are familiar.
(No reply.)

Q. Let me ask you this: on the back of the card there, there are certain expenses of doing business listed, is that right?

A. I don't know what these two are (Indicating). Why should I tell you that I know what this is?

Q. To what items are you referring?

A. "Ser." and "Dr."

Q. You are referring to the items at the bottom?

A. It is \$30 and \$50.

Q. Do you understand the rest of the items on that card?

A. Most of them, all but the bottom, "Elr.-\$5.00." [470]

Q. And now you say this was all part of your—this book was kept for you by Mr. Krakauer, the records of the front room, as you call it?

A. The records for the main room, yes.

Q. The first item is, "Pap. 15,"?

A. Yes, that is newspapers.

Q. Fifteen cents, is that right? A. Yes.

Q. The next item is "Sal. 52". Is that salary?

A. That's right.

Q. That is what you were paying the men who worked per day, is that right?

A. That's right.

Q. The next item is "Frm. \$2.00". What is that? A. That is racing form.

Q. For forms? A. For forms.

(Testimony of Julius Wild.)

Q. The next item is "Janitor—\$5.00," what is that?

A. Well, that is the salary of the janitor.

Q. The next item is "Ext. \$30.00". What is that?

A. Well, that is what I was say is extras. Now it is hard for me to explain what that could be. That could be if somebody come for the Greek relief, or something like that. In other words, the money was taken out of the books, because I subscribed to them every month and I subscribed to the [471] Red Cross and the Community Chest and every one of them. In fact I might have got the receipts for them.

Q. Do you have any definite recollection at this time of what "Ext.—\$30.00" meant?

A. I do not.

Q. The next item is "Rent—\$117.50." Was that the monthly rent on the premises?

A. No, it was \$100 what I paid.

Q. What does the \$117.50 Rent mean then?

A. If you will let me study a minute, I will answer you on it, because that was paid quite a bit.

Mr. Harper and Mr. Hone—that is, the managers of the building—come down and said they will need more rent, "You got these lights going all night, not only the back lights, but the front lights."

I said "I don't use them." He said "Well, Krakauer is here every time I come down here, and so he said "You will have to pay \$17.50 more."

Q. So that your rent then was \$117.50?

A. That's right.

(Testimony of Julius Wild.)

Q. Was that the rent you paid throughout this period?

A. No, I just told you, sometimes it was \$100, and I am trying to explain to you what item this is.

Q. In other words, some months you paid \$117.50 and other months \$100. Is that right?

A. Yes, if I did not have it I always paid \$50.00. [472]

Q. The next item is "Nut, \$105."

A. I don't know what that is. I refuse to answer that.

Q. You refuse to answer?

Mr. Belli: He refuses to answer on advice of counsel, upon the same ground that he heretofore gave.

Mr. Campbell: Q. Is that your statement, that you refuse to answer on that ground?

A. That is.

Q. There was testimony here produced by Mr. Hughes, one of the witnesses called by you on your behalf, that you dictated that item to him, "Nut \$105." Did you dictate that item to Mr. Hughes?

A. If Mr. Hughes said I did, I did.

Q. Well, did you? I don't care what Mr. Hughes said. I am asking you what you did.

Mr. Belli: You may answer.

A. I did.

Q. Do you know to what it refers? I am not asking you now for a statement of what it was. I am asking you for your knowledge, yes or no, do you know? A. (No reply.)

(Testimony of Julius Wild.)

Q. Do you know? Answer yes or no.

Mr. Belli: You may answer.

A. Well, Mr. Campbell, part of that I can for sure tell you that I did know. Part of it I didn't.

Q. Well, how much of it do you know?

A. \$105 is an odd figure for that nut. That might be—that is a charitable thing, or something that I added all together and set \$105 for the month.

Q. I call your attention to the fact that from time to time throughout these cards the item of \$105 appears there with the expression "Nut" or with an X or double X. Do you know what that \$105 item is that appears from time to time?

A. You say the "nut" was only on these several times?

Q. You were here and heard the testimony as to a number of X's or double X items of expense, \$105.

A. Some of them might have been for the nut and some of them—might have referred to the nut and others double X \$15, or any odd small amount, was for charitable things.

Q. What is the nut you refer to here?

A. What do you mean, what is the nut?

Q. On this card, "Nut \$105," what is that?

A. Well, what I got through explaining, part of it for the——

Q. I did not understand your explanation. Will you repeat what the \$105 was paid for and to whom it was paid?

A. Well, it was paid for the main running expenses——

(Testimony of Julius Wild.)

Mr. Belli: Just a minute, please, Mr. Wild. I advise you on that compound question to claim a constitutional right against incrimination, self-incrimination. You may take my advice or you may seek other counsel before you claim your constitutional [474] immunity.

If you desire to claim it, you may accept my statement as the grounds for refusal to answer the question. I respectfully put it in that language, if Your Honor please.

Mr. Campbell: I ask for the question, if the Court please.

The Court: Will you read the question?

(Question read by the Reporter.)

Mr. Belli: I have given my advice, Mr. Wild, that you may refuse to accept that advice and you may seek other counsel, or you may decide at your own dictates whether you are going to answer that. If you decide that you are accepting my advice to you, you will then answer that you refuse to answer the question on constitutional grounds, on the ground that the answer will tend to incriminate or degrade you, or subject you to another crime other than the crime for which you are presently on trial.

A. I take my counsel's advice on it.

Mr. Belli: May the record so show.

Mr. Campbell: You refuse to answer on that ground?

A. I do.

Mr. Campbell: I press my question, if the Court please.

(Testimony of Julius Wild.)

The Court: The witness has refused to answer upon constitutional grounds. He may rest on them.

Mr. Campbell: I did not get the Court's ruling.

The Court: He may rest on that ground.

Mr. Campbell: During the recess, may I be heard on this question, if the Court please?

The Court: You may—on this precise question before the witness at the present time?

Mr. Campbell: On this precise question.

The Court: I think I anticipate that you are going to—well, the jury is here now. Proceed.

Mr. Campbell: I will take up another question and we will pass on to another subject for the time being.

The Clerk: Here is No. 1.

Mr. Campbell: Let the record show that the card that was previously missing has now been found, apparently out of order.

Q. Mr. Wild, considerable has been said about a book, or a little black book, which you stated you kept, and which I believe you described as a 6 by 8 black book. You recall that testimony, do you?

A. I do. I said I kept a book 6 by 8. Whether it was black bound or tan, I did not know, but it was a book.

Q. Yes. I believe you said—I don't know whether it got in the record or not here, but you referred to a book about the size of this Defendant's Exhibit L, is that right?

A. That's right.

(Testimony of Julius Wild.)

Q. This, of course, is not the book you refer to as the little black book? [476]

A. It is not.

Q. This particular book is a book showing the dates of employment of the various employees, is that right? A. That's right.

Q. And was kept, I presume, for Social Security purposes? A. It was.

Q. This book has nothing to do with the amount of money or profit that you may have made from day to day or week to week or month to month?

A. It has not.

Q. Now, when did you last see that black book that you referred to?

A. It is hard for me to tell you when I last saw it. I tried to explain that to you before. I don't know when I last saw it, but it was in the year 1943, if that is what you are driving at.

Q. You stated the last time you saw it was around or about some raid on the place, is that right?

A. Well, I am not so sure, I don't know.

Q. You recall Mr. Hughes testified here on your behalf as a witness, said that the last time that he saw that book was in the spring of 1941. I suggest to you that your place was closed in April or May of 1941. Did you ever see the book after that time?

A. Meaning a book 6 by 8? [477]

Q. Yes.

A. I saw it all the time—in that year.

(Testimony of Julius Wild.)

Q. What's that?

A. I saw it in 1941 and I saw it in 1942—a book like that. I don't mean the same book. I have had a book pretty near every year—when it ran down to the end.

Q. I am referring to a book in which you made entries and in which you show your true profit or loss on your entire business.

A. That's right.

Q. And you saw that in 1941, '42 and 1943, is that right?

A. Yes.

Q. Was it just one book that you had for all three years, or was it——

A. No, no, I had a book every year.

Q. Then there were three books, weren't there, for this period?

A. There might have been four.

Q. There might have been four books?

A. Yes, it might have been a carryover from 1940.

Q. All right. When was the last you saw the book relative to 1941 that has your 1941 entries in it?

A. After I had taken the 1940 figures and entered them in the new book, and I would either put them in my trunk or I would take it down and store it in the—well, in the library [478] down at the place.

Q. You mean at 1182 Market Street?

A. That's right.

Q. Well, now, during 1941 were you making

(Testimony of Julius Wild.)

entries daily in this book, the book that has your 1941 entries in it?

A. Well, if I did not make them daily I made them weekly.

Q. All right, weekly. A. Weekly.

Q. And that continued throughout 1941, is that right? A. That's right.

Q. When did you last see the book that had those 1941 figures in it?

A. I last see that book about in—put it in the 1942 start.

Q. When did you ever see it in the 1942 "start"?

A. When the year 1942 started, January 1, 1942.

Q. Did you destroy your 1941 book at that time?

A. I don't think I did. Maybe I put it in the trunk in the hotel, or I put it back over there in the room. I had a lot of storage there.

Q. The 1942 book that you started has your 1941 figures in it, too?

A. That is correct, you know, the last figures, you know what—that total figure of the whole year was carried over to the next year.

Q. Those contained the expenses of the year?

A. (No reply.)

Q. What figures did you put in there in the book, in 1941?

A. I put my total losses and total gains, and then at the end of the year I put what I lost and what I gained and what I reported to the Government in my income tax return—my income tax return and my income tax payments.

(Testimony of Julius Wild.)

Q. When was that, in what month?

A. If I had the 1941 book, I had the 1940 year in there. That is, I put in 1940, March 15 or March 10, for whatever year it is. If I had the 1942 book, I had what I paid in 1941.

Q. All right. Let's take with relation to your 1941—your business of 1941 and your 1941 income tax return, which is Government Exhibit No. 1 here. At the time that that return was prepared, did you have a book which had in it the information as to your income of 1941? **A.** It did.

Q. And where was that book? Is that the book to which you refer? **A.** I just told you.

Q. What was the total figure? Did it have the total expenses and the total income?

A. I would go over to the adding machine, jot it all down for every item, 52 weeks, and that would be the total for 52 weeks and then I would sum it right down through the year.

Then I would take the piece of tape off there and if I had [480] the books there, I would put it right in the book. If I had it in the room, I would take it over to the room and destroy the tape.

Q. And you never showed these books that you referred to to Mr. Callahan when he prepared your returns, did you?

A. I did not care to show them to anyone.

Q. You did not show them to him?

A. To whom?

Q. Mr. Callahan. **A.** No.

(Testimony of Julius Wild.)

Q. As I recall, he asked you from time to time for books? A. He did.

Q. But you never showed him any books?

A. I did not.

Mr. Campbell: Does Your Honor care to take the recess?

The Court: What was the previous question, Mr. Reporter?

(Last few questions and answers read by the Reporter.)

The Court (To the Witness): You did not from time to time show Mr. Callahan the books?

A. I did not.

Q. By that I mean the black book? We referred to it as the black book; we all know it as the black book.

A. I did not show him any of them.

Q. You did not show Mr. Callahan any of them at all? A. I did not. [481]

Q. As I understand you, Callahan asked you several times for that book?

A. Well, he asked me sometimes on the income tax.

Q. That was the only source of information you had available for the Government in connection with income tax returns? A. In that book.

Q. Yet you saw fit not to show Callahan the contents of that book? What, if any, reason have you now to offer why you did not show that book to Callahan?

A. Well, I had some private information like telephone numbers in there, and I did not care for

(Testimony of Julius Wild.)

anybody to see that, because the people that were involved in them telephones were very important people.

The Court: All right, we will take the recess.

Mr. Belli: I wonder if that question could be answered to your Honor in chambers without having it come out in open court here.

Mr. Campbell: We object to that. That is not proper.

The Court: Well, ladies and gentlemen of the jury, we will take the afternoon recess, and may I again admonish you not to discuss this case amongst yourselves or suffer or permit any person to converse with you on any subject of the trial until the case is finally submitted to you.

Counsel, you have several matters to discuss with me?

The jurors may now retire for the afternoon recess.
(Thereupon the jury retired.)

(The following proceedings were had in the absence of the jury:)

Mr. Campbell: I think Mr. Wild should stay in the courtroom.

Mr. Belli: I don't think this will take long. I think I know what counsel has in mind.

Mr. Campbell: I will make it brief. I simply wanted the record to show that I press the matter with relation to certain questions which have been asked of this witness, and his refusal to answer, on the ground that the answer may incriminate him on several grounds, further that it might tend to degrade him.

(Testimony of Julius Wild.)

We have here a situation of a defendant who has offered himself on the stand, and who has thrown aside the cloak of immunity, which is in favor of the defendant, in a criminal case, where he can not be compelled to give evidence which will incriminate him.

So far as other clients are concerned, the cases with which I am familiar deal with other people, witnesses who are produced, and who are asked questions which may disclosed the existence of other crimes.

But so far as the defendant here concerned, the very things in issue are the amounts and sources of his income, what his expenses are, whether or not they were ordinary and necessary [483] expenses of doing business.

We are faced with the situation here where he is claiming certain expenses, and yet in order for the Government to verify those expenses, he is raising the cloak or the purported cloak, or the claim rather, of constitutional immunity against self-incrimination.

I do also want to point out in that regard, that if there is conceivably any federal crime—and I think my point is well taken—that this Court only acts to protect the witness against incrimination for federal offense and not with regard to a state offense, but if there was any crime that would be or could be involved by any admission or answer which we could conceive of this witness giving in answer to these questions, the statute of limitations

(Testimony of Julius Wild.)

has run as to violations of the Federal Communications Act.

Counsel referred to this offense having transpired back in 1941, '42 and 1943. I think I am correct in asserting that crimes under that act are barred after the termination of three years.

We think that to permit the witness to stand upon and to secure that cloak of protection by the Court, impairs the Government in its pursuit of the truth with regard to claimed expenses by these defendants.

(Off-the-record discussion between counsel.)

Mr. Campbell: I want to point out a matter that was [484] called to my attention by Mr. McMillan, and that is that in these cases, the law is well established that the Government is entitled to claim these taxes, regardless of the illegality of the defendant's business, and the nature of that business is a legitimate inquiry, even though the subject of the business itself may be of an illegal nature.

The Court: That is true.

It is further true that certain expenditures—this is the Government's position, which the Court has not ruled on, although offered in instructions—that certain types of expenditures are not allowable in an illegal business, as being contrary to public policy, and I think the reasons for that are well founded in logic and well founded for moral reasons.

Now, we are attempting here to verify items set forth on his cards for expenses, and I think we are

(Testimony of Julius Wild.)

entitled to be able to verify those, to the extent that it is possible to do so.

Mr. Belli: Just in brief answer, if there is any question about what those items are for—although it is entirely in the record now, they were for this pay-off. That is clear from the record, but that could be stipulated to.

If counsel says that those are not properly deductible items, we have it in the record that we can stipulate to, that they are pay-offs. Whether they are deductible or not is a question of law and not of fact, because I am willing to stipulate. [485]

On the other issue, there is still open here the question of whether Mr. Wild should be indicted for conspiracy to violate the Federal Communications Act and any number of acts under the federal as well as state statutes, and the statute of limitations does not bar on that.

Without elaborating on that, your Honor can see that placing a wire service into a bookmaking establishment is not the end in view per se. What the bookmaking establishment is trying to do is make money on gambling, and gambling is the illegal enterprise, and the pay-off is for the illegal enterprise.

Conversely, you start with the pay-off, and the whole illegitimate enterprise, right straight on up to the wire service, and the conspiracy is brought before your very eyes, and that is why I think the man must necessarily take his constitutional immunity.

Mr. Campbell: May I add this one thing as to the pay-off—

(Testimony of Julius Wild.)

The Court: Are you willing to accept counsel's stipulation?

Mr. Campbell: I think we are in agreement, your Honor, that that particular matter should not be a matter of stipulation, by reason of the fact that it has a bearing upon the intent of this defendant with respect—I might say in that particular item at least an unfortunate intent which has a direct bearing on this case, so far as the real offense is concerned.

The Court: I can not understand why the wire service [486] assumes the proportions it seems to assume. I can not over-dramatize that phase of it.

Mr. Campbell: I understand.

The Court: Wire service is wire service, and you are not claiming, in the returns, any deductions are not allowed for wire service.

Mr. Campbell: No, we are allowing that deduction, your Honor, so possibly that assumes something out of its proportion.

The Court: You move from the province of debate the so-called wire service, because the Government is admitting any amounts paid thereon are legitimate deductions.

We do, however, come to a more basic problem, and that is the question of the so-called pay-offs—it has been so characterized by counsel — in the amounts of \$105. That does go to the very heart of this controversy. The Government claims that that amount of \$105 each and every month is not a deductible item.

(Testimony of Julius Wild.)

Mr. Campbell: Correct, your Honor.

The Court: As the amount involved was paid in such fashion as to be contrary to the policy of the law and contrary to good morals.

Now, the only basis upon which we can ferret out the nature of that payment and the scope of it, whether it comes within that particular bracket within the condemnation of the law, is [487] to develop the facts.

The defendant has placed himself on the stand, and I think I have offered him considerable protection during the course of the cross examination. As to that protection, the Government's counsel has not objected. I think we are all in accord on that phase of it. I do feel, however, that the Government's counsel is correct, the witness Mr. Wild should characterize the payments, at least because of its appellation, in proper description and terms, from his viewpoint. Mr. Krakauer has testified on it.

The witness has attempted—whether designedly or not—to say that there was some charity matters there.

I think, in the light of counsel's question that he is entitled to go into it and ferret out the characterization of it.

The witness is instructed to answer that question. You will resume the stand, Mr. Wild, and answer the question.

Mr. Belli: So that the record may be clear, may we take an exception to your Honor's ruling? I

(Testimony of Julius Wild.)

think if your Honor persists in the ruling, with all due respect, it will result in a mistrial and misconduct on the part of the United States Attorney and the Court, particularly after we have offered to stipulate as to what that is, and there certainly is no question in the record what the payment was.

Counsel refusing therefore to take the stipulation, [488] regardless of what he said on the record, must not then be in good faith in preferring to get from this witness what he wants to get from him, that is, the details of this gambling venture.

The Court: There is one contradiction to that, counsel: The fact is that the witness has testified, just prior to the recess, that part of the \$105 was paid to charity, the Community Chest, War Relief and the like. Now, if that stipulation had come out at a time prior to that answer, I think it would be a fair case on the part of counsel to accept it.

Mr. Campbell: Except for one thing, your Honor: I wish to point out, since Mr. Krakauer's testimony as to the nature of these payments, there has been a very serious attack upon his credibility, with inferences that he is completely unreliable. I think we are entitled, if we can, to substantiate all parts of his testimony.

Mr. Belli: How does that substantiate the witness' testimony, by having Mr. Wild, the party here, being forced to testify to a separate crime? That's what it amounts to.

The Court: Well, that is my ruling.

Mr. Belli: May I—so the record may be clear—say one thing further on it, your Honor?

(Testimony of Julius Wild.)

Counsel persisted in forcing Mr. Wild to answer those questions. We move at this time to strike out any testimony with reference to what these payments were, when the record was [489] clear on that, and it is a question of law as to whether these are deductible income items.

The Court: Counsel, may I ask you to direct your attention to the specific thing you have in mind? Are you talking of the \$105?

Mr. Belli: Yes, we move to strike out any testimony with reference to that question of its being for charity or anything else. I think that came from the witness by way of misconduct on the part of the United States Attorney, in repeatedly asking him the question, after the witness showed that he wanted to take a constitutional on it. We move to strike that out. So that the record will be clear at the present time, again we are willing to stipulate as to what those payments were and we indicate in the record that counsel can not be in good faith in pursuing this issue, after the stipulation is offered that they were for pay-offs.

If there is now an attempt made to show some collateral crime on the part of Mr. Wild, it is only for the purpose of prejudicing him in the eyes of the jury.

Mr. Campbell: Mr. McMillan calls my attention to a matter I was also going to call to the attention of the Court, that we have a situation here where counsel is now attempting to stipulate that his

(Testimony of Julius Wild.)

client did not tell the truth on the stand. I think the jury is entitled to the truth of this matter.

The Court: That is the basis of my ruling. I thought I [490] made that clear.

Mr. Campbell: The stipulation does not have the dignity of testimony. On that record we stand. We will submit it.

Mr. Belli: So that your Honor understands, and the record is clear, my position is that he was badgered into and forced to answer, by way of misconduct on the part of the United States Attorney.

The Court: Counsel, for fear that some reviewing court might perchance by some small degree be misled by that term "badgered", I desire to have the record show that at no stage of the cross examination of the defendant Mr. Wild was he badgered, molested, interrupted or otherwise cajoled into any answer or admission concerning any material fact.

Mr. Belli: Except that the man had taken the constitutional, your Honor, and he was repeatedly asked and questioned upon it, and he said that he refused to answer.

The Court: That was the Government's province. I think the defendant Wild is getting as fair a trial as any man ever received in this court.

We will now take the recess.

(Recess.) [491]

Mr. Campbell: Shall I proceed, your Honor?

The Court: Yes.

Mr. Campbell: Q. Mr. Wild, I am going to return to you the first card of Government Exhibit

(Testimony of Julius Wild.)

No. 7, pertaining to the first week of January, 1940, and I am handing you this time the original which has been found rather than the photostatic copy, and I am going to direct your attention to the listing there of expenses where there is the word "Nut—\$105." I will ask you what that expense was, and to whom it was paid.

Mr. Belli: May the record show the witness on the advice of counsel refuses to answer on constitutional grounds, and I think your Honor made a ruling and your Honor may so advise the witness.

The Court: The witness was present during the recess when I ruled on this point. You may now answer that question, Mr. Wild.

The Witness: A. Your Honor, at this time when this card is made out, and this was put on, I was at Santa Anita. If you have another card where I was I could explain it because I didn't make this up.

Q. You did not direct that entry?

A. I was not here. I was at Santa Anita.

Q. So that as I understand your answer now, you don't know what this "Nut—\$105" is?

A. I don't know, because I wasn't here. [492]

Q. Do you know what this item "Ext—\$30" is on the same card?

Mr. Belli: May my objection and exception and admonition and motion run to all of this line of testimony without the necessity of repeating it, your Honor?

The Court: It may, but, of course, "Ext" comes

(Testimony of Julius Wild.)

within a different category altogether. Did he say "Ext" means "extras", is that right?

Mr. Campbell: Yes, your Honor, but I am repeating to him, asking him if he now knows what that "Ext" is.

The Court: Objection overruled.

Mr. Belli: But my objections, exceptions and motions may run to all this line of testimony without the need of renewing them?

The Court: Yes, and the record may so show, counsel.

The Witness: A. I didn't write this "Ext" for this ticket. But I have an idea what it is. It could be two or three or several things. I don't know exactly what this is.

Mr. Campbell: Q. I am going to direct your attention to card No. 9 of the group, Government's Exhibit No. 7 for the period ending March 1, 1942, and to the expenses labeled "X-105." Do you know what that is, sir?

A. He said this is 1942. This is March 1, 1941.

Q. 1941, I beg your pardon.

A. March 1, 1947. I was not here either. [493]

Q. Where were you on that day?

A. Where was I March 1, 1941? I can tell you close to March 1. I can't tell you where I was on that day right now. I am trying to.

Q. Can you state definitely you were not in San Francisco on that date?

A. If you show me the calendar, Mr. Campbell, I could for 1941.

(Testimony of Julius Wild.)

Mr. Campbell: May this be marked for identification, if the Court please?

The Court: So ordered.

(Calendar for 1941 was marked U. S. Exhibit 16 for Identification.)

Mr. Campbell: Q. I am going to show you a calendar for the year 1941, which has been marked U. S. Exhibit 16 for Identification, and I ask you where you were on the 1st day of March, 1941.

A. This is on a Saturday. To the best of my recollection I left here either on a Thursday or a Friday to see Saturday's races at Santa Anita and to go to work at Tijuana on Sunday and come back Monday, but I didn't get back until Monday or Tuesday.

Q. Were the races running at Caliente at that time? A. Every Sunday.

Q. And you were not here on any Saturday through 1941? [494]

A. I would be here some Saturdays until one or two o'clock, depending upon what plane I would take or what transportation I would get.

Q. Did you go to Caliente or Tijuana every Saturday of 1941?

A. If I was not there Saturday night I would be there Sunday night. Not every — but when the weather permitted, or if I could drive I would make it every time I could.

Q. Mr. Wild, you have heard Mr. Krakauer testify here that the item of \$105 were a monthly item paid for protection. Did you hear that testimony?

(Testimony of Julius Wild.)

A. I heard what he testified to.

Q. And was there such a payment made every month in connection with the business?

Mr. Belli: May I have the same objection and exception and admonition?

The Court: Yes, and the objection is overruled.

Mr. Belli: And it is also understood the witness still seeks to accept his constitutional with respect to this question?

The Court: Yes, to this particular point.

Mr. Campbell: Will you read the question, please?

Mr. Belli: Q. Mr. Wild, you were asked—

Mr. Campbell: No, let the reporter read it.

(Question read.)

The Witness: Not exactly \$105. There was such a payment [495] like that made, but it varied.

Q. How much was that payment?

A. What do you mean, how much was the expense?

Q. How much was paid a month for protection expense.

A. I would give \$80 one place and ten another, and there never was \$105 put in one envelope.

Q. Where did you give the \$80?

Mr. Belli: May the record show through all this testimony the witness does on the advice of his counsel refuse to answer because to do so will tend to incriminate him or degrade him and put him in a position of being charged not only with a State

(Testimony of Julius Wild.)

but a Federal crime, as well as being charged with income tax evasion.

The Court: Counsel, ask the question, if the item of \$105 over a period of months, as embraced in the returns, represented so-called protection money. If that question is asked and answered we will then depart from this particular subject.

Mr. Campbell: As to the question suggested by your Honor, the payment is not embraced within the returns. It is in the cards.

The Court: It is integrated in the figures but embraced in the cards. Rather than to segment it and ask where \$10 or \$80 may have gone, I think if you had that in the record that would be sufficient. [496]

Mr. Belli: May the record show my continuing objection, exception, admonition and motion?

The Court: Yes.

Mr. Campbell: Q. Mr. Wild, did you pay throughout the period and to whomever was paid the amount of \$105 a month in the aggregate each month for purposes of protection?

A. I wouldn't say it averaged \$105, and, furthermore, I don't know whether this is protection money or what, or whether it was my own money. When I was first there I had to take it "down the lines" and then to Peter McDonough, and I don't know what it was for. If I was operating I had to pay that expense.

Q. And you couldn't operate unless you paid it. That was your belief at the time? A. Yes.

(Testimony of Julius Wild.)

Q. And that is, it ran to \$105 a month?

A. I am trying to tell you, it ran more and it ran shorter.

Q. I call your attention to the fact that throughout these cards from time to time there is the item of \$105. Is that the item to which you refer?

A. Yes. You know, it is a sample of what I am referring to.

Q. But you believed you could not operate unless you paid it, and it was for that purpose for which it was paid?

A. When it comes to protection, you said "protection — protection." I was not protected very much when I was arrested [497] 23 times in 23 months.

Q. In view of your statement, you ordinarily knew in advance when there was going to be a raid on your place, did you not? A. No, sir.

Mr. Belli: That's objected to as incompetent, irrelevant, and immaterial.

The Court: Objection overruled.

Mr. Campbell: Q. Weren't you advised?

A. Well, the runners would call me if they raided my competitors they would call me and say, "It is getting hot down here. Watch your step."

Q. But you did secure advice in advance of any of those raids with a few exceptions?

Mr. Belli: Just a minute, that is objected to on the ground it is incompetent, irrelevant, and immaterial, and could have no bearing on the charge of income tax evasion. I advise my client not to

(Testimony of Julius Wild.)

answer the question on his constitutional. If your Honor instructs him he will have to abide by your Honor's instruction.

The Court: The objection is overruled.

Mr. Campbell: Will you read the question?

(Question read.)

Mr. Belli: And I have an exception to your Honor's ruling, too.

The Court: Yes. [498]

Mr. Campbell: Q. You may answer the question, Mr. Wild.

Mr. Belli: Q. You can answer that "Yes" or "No". The Witness: A. No.

Mr. Campbell: Q. Isn't it a fact, Mr. Wild, that you were advised and arranged bond in advance of the raids?

Mr. Belli: That is objected to as incompetent, irrelevant, and immaterial, highly prejudicial; it tends to incriminate and degrade the character of the witness here and the defendant, himself, for other crimes than for which he is being charged here. In fact, he is being put on the stand now for more than the crime of income tax evasion, and I again, to the best of my humble ability, advise my client to abide by his constitutional guarantee on the ground to answer will tend to incriminate or degrade him on other charges than that presently being tried before your Honor and this jury. If your Honor rules otherwise, he will have to abide by your Honor's instructions—

The Court: I believe, Mr. Campbell, a sufficient scope has been given to surround that payment

(Testimony of Julius Wild.)

sufficient to characterize it. If you pursue the matter beyond this, I will sustain counsel's objection.

Mr. Belli: Thank you. Is that all, then, on this subject?

The Court: I think the witness has answered the questions. We have allowed sufficient latitude on that. [499]

Mr. Campbell: All right.

Q. Now, let us come back to this little black book. Mr. Wild: You say at the time that the revenue agent called upon you for further books to substantiate your 1941 return, you turned this black book over to Mr. Krakauer, is that right?

A. I did.

Q. And from it he made up the 12 cards that you and Mr. Callahan took down to the revenue agent's office? A. He did.

Q. But you never showed the black book to Mr. Callahan at any time?

A. Not to my knowledge.

Q. So that so far as you know Mr. Callahan did not know what was in the black book, is that right—so far as you know? A. Yes.

Q. Now, there has been some testimony here by Mr. Callahan as to how he made out with the returns. You heard that testimony, didn't you?

A. I did.

Q. You heard Mr. Callahan? A. I did.

Q. And you heard him testify that you would supply him monthly averages as to the various expenses which you had there and he would set those

(Testimony of Julius Wild.)

down for each month, isn't that right? You heard that testimony, is that correct? [500]

A. I think so.

Q. And you heard his testimony that the only record he ever had before him was with respect to the wages paid your employees, Social Security, which is this book Defendant's Exhibit L, is that right? A. That's right.

Q. And that is the fact, that that is all you know that Mr. Callahan had? A. That is all.

Q. And that is all he had at the time he prepared the return for 1941?

A. That is all. I gave him the figures.

Q. You heard Mr. Callahan testify, did you not, that he averaged these expenses you gave him, plus the salaries, and added approximately \$5000 as your profit for the year, is that right?

A. I don't know where he got the right of \$5,000. That ain't the figure I gave him. The figure I gave him was exactly the figure that I had in the book.

Q. Did I understand your testimony that you did not, as Mr. Callahan said, give him a figure of profit for the year? A. Oh, yes, I did.

Q. Was that figure \$5000 for 1941?

A. I don't know exactly what that figure was. If you show me this book, or if I had the book I could tell you.

Q. Mr. Callahan testified you told him your profit was \$5000, [501] and so he added that to the expenses to arrive at the gross business.

(Testimony of Julius Wild.)

A. I didn't say the profit was five thousand—I said around five thousand.

Q. Did you supply the figure \$4998.36 as your profit?

A. If Mr. Callahan put it down I supplied it.

Q. Did you supply that figure?

A. I am not sure of it, that I supplied it, but I supplied my figures to him. Now, if that was the figure I supplied him that is what he got, and if I had my book I would tell you exactly to the penny what it was.

Q. And you say the black book you had supported the figures that were taken down to the revenue agent?

A. That's right.

Q. And were taken out of that book?

A. That's right.

Q. Yet those are the same figures that Mr. Callahan arrived at in his work sheet in the method he described here?

A. I guess that's right, too.

Q. You found that Mr. Krakauer was a very efficient and accurate bookkeeper, did you not?

A. He was so accurate that I never had another one like him, or never saw one like him.

Q. He kept track of everything right down to the penny?

A. And if there was anything smaller than a penny he could keep [502] it smaller than that.

Q. That's right?

A. That's right.

Q. And he kept those records for you for the period of nine or ten years, didn't he?

(Testimony of Julius Wild.)

A. I don't know whether it was for the period—

Q. Well, it was a period of several years?

A. Around that.

Q. There has been some question here about sleepers.

A. Yes, sir.

Q. Did you include the sleepers in the book which you kept?

A. No.

Q. Were the sleepers included on the cards which Mr. Krakauer kept?

A. Sometimes they were. It all depended — Now, if there was — Well, you asked me and I will answer you. I said it all depends.

Q. Were they reflected on those cards, Government's Exhibits 7, 8, and 9?

A. Maybe a few were and maybe they were not.

Q. Do you know?

A. Well, it is "Yes" and "No". There might have been some; I never saw no sleeper on there yet. On every one of those cards I looked at I never saw a sleeper.

Q. These are the cards you used in making up that black [503] book, weren't they?

A. But I never got no card with no sleepers. He and I tended to those sleepers before I went with my part.

Q. That has nothing to do with these records?

A. What, the sleepers?

Q. Yes, the sleepers.

A. I don't think so. You may find one or two

(Testimony of Julius Wild.)

there, but maybe I can explain them. There is a large sleeper there—

Q. Did you find any sleeper when you went through these? A. What?

Q. Did you find any sleeper when you went through these cards?

A. Mr. Campbell, I wasn't looking for sleepers. I was looking at the writings to make sure that every one of them were Mr. Krakauer's cards. I didn't look for sleepers.

Q. Will you look during the evening recess and determine whether or not there are any sleepers there? A. When, now?

Q. During the evening recess or in the morning before court. A. Sure I will.

Q. All right. Let us go for a minute to your business at Tijuana or Caliente. Which was that, Tijuana, or Caliente?

A. Well, it is the same thing. It is Caliente Jockey Club in Tijuana, Mexico.

Q. That's right, so that those terms are used interchangeably when we say Tijuana or Caliente?

A. It refers to the same place.

Q. The town in Tijuana and the track is at Agua Caliente, the hotel? A. That's right, sir.

Q. All right. You say during the period in question you went down there about 50 times, as I understood your testimony.

A. Well, it would figure around that. It is hard to say. If I had my book I could tell you every trip I made.

Q. For purposes of refreshing your recollection,

(Testimony of Julius Wild.)

you were shown a document which bears the number of some account with the United Air Lines in 1941 or 1942. A. Yes.

Q. Can you state approximately how many times you were down there in 1942?

A. I cannot.

Q. Would it be every week end?

A. If the weather permitted.

Q. Was it the same way in 1943?

A. Oh, no—no, no—1943. I think the Government— Well, 1943 you had to have priority to go, and sometimes I could get to go and sometimes I couldn't. In other words, if there was nothing—

Q. You mean plane priority, is that right? For plane reservations? A. That's right. [505]

Q. About how many times did you go in 1943?

A. That I can't tell you, because I don't know, myself.

Q. Did you average once or twice in a month?

A. I don't know.

Q. Caliente is only open during the winter months, isn't it?

A. It is open the year round.

Q. Was it open the year round then?

A. Yes.

Q. However, during 1941 and 1942 you averaged almost every week end, is that right?

A. Well, I wouldn't say every week end, because there was times here that I would get so that I just couldn't make it. So I would phone down and have the man that is working for me, Mr.—I think his name was Robert Campbell. Well, he was one

(Testimony of Julius Wild.)

of my men, and "Green Tie", he was in charge, and I would phone him and say, "I can't make it."

Q. Throughout this period when you would get down there you were making book, is that right?

A. Yes, sir.

Q. And for that purpose you established a credit down there, you say, with the club.

A. I always had a credit there.

Q. And you had a credit of \$5000 at least?

A. No, I never did have that kind of cash up, but I still had that— Well, my name was worth it.

Q. When you went down there, I believe some question was asked of Mr. Hughes—did you take cash down with you?

A. Oh, what I had in my pocket.

Q. How much cash would you have in your pocket and how much cash did you take down with you?

A. Whatever I had in my pocket. If the book went good I had a good bankroll, and if the book went bad I had a short bankroll.

Q. When you talk about the book are you referring to the book up here? A. Yes.

Q. In 1942 and 1943 how much were you in the habit of taking to Caliente or Tijuana when you went down there to run your betting down there?

A. You are going into 1943, and I just told you I would have to wait until somebody was bumped off until I could get a plane ride, because the Army and Navy services came first, and I came next.

Q. You were down there in 1942?

(Testimony of Julius Wild.)

A. Yes, let's take 1942 first.

Q. All right, let's take 1942 first. How much money did you take down there?

A. If I went I would go to the book and have a thousand dollars, if everything went all right, and I would take that one thousand dollars with me.

Q. Sometimes it would run over that?

A. Sure, it would.

Q. How much is the most you remember taking down with you? A. Of my own money?

Q. Of cash that you carried down there for betting purposes.

A. I carried cash for men here that got big cash from the east, three or four thousand dollars.

Q. Was that the average amount you would take down with you, your own or somebody else's?

A. No, one thousand dollars was my own and the rest was other people's.

Q. You would carry other people's money?

A. Yes.

Q. Sometimes three or four thousand dollars, is that right?

A. Not sometimes. Now, maybe two times a year or three times a year. One time I carried seven thousand dollars down.

Q. When was that?

A. When Seabiscuit win.

Q. What year was that? A. 1940-41.

Q. And Seabiscuit ran at Caliente?

A. No, for the future book.

Q. Well, let's take Caliente.

(Testimony of Julius Wild.)

A. They had a future book at Caliente. They run it every year. [508]

Q. That was money you took for Caliente?

A. Yes.

Q. Let's take 1941—Seabiscuit ran in 1940.

A. Yes, and 1941.

Q. Let us take 1942 first. We are talking about 1942 first at your own request. A. Yes.

Q. You said you carried about \$1000 of your own money, is that right? A. Around that.

Q. To Caliente?

A. To anywhere I would go.

Q. And to Caliente when you went there, is that right? A. Yes.

Q. And you would carry sometimes three or four thousand dollars of other people's money occasionally?

A. Now you got it—occasionally.

Q. Now, in 1943 when you went down there how much of your money did you carry at times when you went down there?

A. Pretty near the same amount of what I had in my pocket.

Q. How did you carry that, in currency or coins or checks? A. Always currency.

Q. In what form did you bring back the money you brought back from Mexico? Would that be in currency or be check, or how?

A. The same thing. [509]

Q. Currency? A. Yes.

Q. After August 8, 1942, when you went down there, did you register that currency at San Diego?

(Testimony of Julius Wild.)

A. What do you mean register? I registered nowhere. I registered at the border. You had to register at the border.

Q. Did you register the currency?

A. Sure, I did. I had to register. Well, I had to get change for it.

Q. Did you leave a record at the border when you came back as to the amount of currency?

A. They would take the record. If you did not give them a record you didn't get over and you had to change it into \$2 bills.

Q. As a matter of fact, you couldn't carry any currency over after August 8, could you, Mr. Wild?

A. Yes, you could carry all the currency you wanted.

Q. In \$2 bills, but no other denominations?

A. That's right.

Q. Did you carry all this money in \$2 bills?

A. When I came back?

Q. Yes.

A. Well, what I had in my pocket had nothing to do with the book.

Q. I am asking you about the money you brought back from across [510] the border after these expeditions of yours. Was that all in \$2 bills?

A. If I borrowed some money off of them and had money, or wanted to get a check, I could go into the office and get a check.

Q. You did not deal in any of the scrip, did you?

A. No, I did not.

Q. You never dealt in the scrip that was put

(Testimony of Julius Wild.)

as between the United States National Bank and the Banco del Pacifico, of Mexico?

A. No, sir.

Q. You always dealt in currency?

A. I did.

Q. And you always registered that at the border?

A. I did.

Q. That was under the Foreign Funds Control that you registered that?

A. I am pretty sure I registered it.

Q. All right, sir.

A. If you didn't register those things you know what they done with them things. You just registered them and they gave you some change.

Mr. Belli: Why don't you wait until the question is asked you, Mr. Wild?

Mr. Campbell: Q. With regard to this Dr. Shornick you [511] referred to, you say Mr. Krakauer kept a record of that?

A. He certainly did.

Q. That was part of his job there to do that?

A. That was his job.

Q. Now, the individual that was produced here this morning that you subsequently identified as "Artichoke Joe," you say you owed him \$1000 since 1943?

A. I did. [511-A]

Q. Is that money that you borrowed from him?

A. It is money I had to pay off.

Q. When did you borrow that?

A. That I don't remember.

Q. You say you gave him security for that?

(Testimony of Julius Wild.)

A. I certainly did.

Q. A ring and a watch?

A. Either a ring—maybe both. He was given a ring or a watch or both.

Q. When did this occur? You say he called you and said, "Come and get your stuff."

A. "Come and get your stuff."

Q. When did that happen?

A. That I could not be sure. I do not remember.

Q. Several years ago?

A. Well, it happened in 1941, '42 or '43.

Q. Well, which time?

A. Well, Mr. Campbell, I don't know.

Q. Do you know that any of this took place, this \$1,000 transaction, in any of the years 1941, '42 or '43?

A. It did, not only on one occasion. I owed him more than that on others. That is just one occasion.

Q. When did it happen?

A. It happened every year.

Q. When was it that he called you and said, "Come and get [512] your stuff."

A. You have a record there. If you could tell me, then I can verify it.

Mr. Campbell: I have no record at all, Mr. Wild.

The Witness: You haven't?

Mr. Campbell: This is the first I know of this.

A. Well, that is true. He said, "Come and get it," and then he was closed for three or four days and I said, "Joe, I haven't got the money right now," and he said, "Pay me any time you want to."

Q. When is the last time you saw him before

(Testimony of Julius Wild.)

he was produced here in court this morning?

A. Since that time.

Q. Well, how long ago was it, as late as last Friday? A. What?

Q. That you had any contact with this Aritichoke Joe.

A. I haven't had any contact with him since I was closed; just when I done business with him.

Q. That was in 1944?

A. I think I done business with him—every time he reopened, I done business with him and big business.

Q. You say you have known him for 15 or 17 years.

A. Maybe I'm wrong, I would say 1926. How long ago was 1926?

Q. Well, 22 years?

A. After I got open three or four years, when I started [513] running a book for myself. Well, it is 17 years, say.

Q. There is no mistake, Mr. Wild, that the same man who appeared here this morning is the same man you described as knowing since three or four years after you opened your book?

A. I could not mistake that man. I could be half blind and still tell you that that is Joe.

Mr. Campbell: May I suggest a recess, your Honor?

(Informal discussion of further witnesses and time to complete the case.)

The Court: Ladies and gentlemen of the jury, we will take the adjournment now until tomorrow

(Testimony of Julius Wild.)

morning at 10:00 o'clock. The same admonition I have given you before applies, not to discuss the case or speak with or permit any person to converse with you on any subject of the trial, until the case is finally submitted to you.

There has been an indication from counsel as to when this case will be completed, and I assume that in the orderly course of events this case will reach you at the latest Friday for your consideration and deliberation. All right.

(Thereupon an adjournment was taken until tomorrow morning, Wednesday, August 18, 1948, at 10:00 o'clock.) [514]

Wednesday, August 18, 1948, 10:00 o'clock a.m.

The Court: You may proceed, counsel.

JULIUS WILD,

recalled: previously sworn.

Cross Examination—(Resumed)

Mr. Campbell: Q. Mr. Wild, during yesterday's testimony you referred to the fact that at all times prior to the time that Mr. Krakauer left your employment that you were in his debt. Can you state at this time how much you owed Julius Krakauer on January 1, 1941? A. I cannot.

Q. What is your best recollection at this time?

A. Well, I was in his debt at all times, so I don't know how much I owed him. I knew I was in debt.

Q. In 1940 you had some losses in connection

(Testimony of Julius Wild.)

with the Santa Anita book, did you not, relative to Seabiscuit? A. I had some losses?

Q. You had some losses. A. Yes.

Q. At that time you borrowed money from Krakauer, didn't you?

A. I borrowed money off of him often.

Q. What is the greatest amount you ever owed Krakauer? A. Krakauer—around \$3000.

Q. Did you owe him that much in the beginning of 1941? A. I don't know.

Q. What is your best estimate at this time as to how much you owed him then?

A. I have no idea.

Q. Did you owe him as much as \$2000?

A. I don't know.

Q. Did you owe him \$1000?

A. I may not have owed him anything beginning 1940.

Q. I am not talking about 1940. I am talking about January 1, 1941. A. '41?

Q. Yes. A. Well, you just said 1940.

Q. Well, at the end of 1940 and beginning of 1941.

A. I don't know whether I owed him anything.

Q. Did you owe him anything?

A. To my recollection I was always in debt to him from the time I employed him, after about eight or ten months.

Q. I am trying to find out how much you owed him then. A. I don't know.

Q. You can't give us any figure of any kind?

(Testimony of Julius Wild.)

A. No, but if you give me a book I can tell you all my figures.

Q. Are you referring to one of these black books?

A. Black book, note book—it is a ledger. It could be tan [516] or black. You have established it as a black book. Now, we will refer to it as a black book.

Q. Is that one of the books you referred to yesterday; you said you may have had three or four of those books.

A. I may have had fifteen of those books, but you mean '41, '42 or '43?

Q. Yes. A. All right, I had them.

Q. You had three books for that period?

A. I had one for each year.

Q. So there were three books for each period, is that right? A. You are right.

Q. Did you have a record in there of the amount you owed Krakauer?

A. I had a record of everything I owed everyone.

Q. But I asked you if you had a record of what you owed Krakauer. A. Yes, sir.

Q. But at the time Mr. Krakauer left your employment you were paid up to him?

A. Yes, I was.

Q. You didn't owe him anything?

A. Not a cent.

Q. You say during 1941, '42 and '43 you owned

(Testimony of Julius Wild.)

a horse named Silent Julie and its mother, is that right? [517] A. I did.

Q. I believe you explained yesterday when you wrote this letter to the collector at Los Angeles in July of 1941, that when you said, "Please be advised that I paid Jockey A. Fermin the sum of \$50 in June and the sum of \$50 in July, 1940, since that time I have disposed of my interests in horses and I am no longer connected with racing"—and I believe your explanation yesterday was that you had disposed of a half interest in your horses to Fitzgerald, who was to be responsible, is that right?

A. What Fitzgerald had down there, yes; but that doesn't say that he doesn't own Julie and his mommie. At that time he was a baby.

Q. Silent Julie was a baby? A. Yes.

Q. Is Silent Julie a male or female horse?

A. He is a horse.

Q. He is a horse?

A. That means a male, and he just win day before yesterday, so he is no hay burner.

Q. Do you still own the horse?

A. I do not. He is nine years old.

Q. So that when you state here, "Since that time," referring to June and July of 1940, "I have disposed of my interests in horses," that is not correct? [518]

A. Do you know, Mr. Campbell, what that is referring to? The horses I had half interest in June and July, maybe that would be the Hollywood

(Testimony of Julius Wild.)

Park meeting at that time, when they were running in June and July at **Hollywood**.

Q. At the time you wrote this letter July 21, 1941, you owned Silent Julie and Silent Julie's mother, is that right? A. That's right.

Q. Now, I call your attention to Defendant's Exhibit G, which are the work sheets for 1942 and '43. On the 1942 sheet there is the name, "Silent Julie—\$800 win—\$1200 cost." Are those the figures you gave Mr. Callahan?

A. Yes, if they are there, I gave them to him.

Q. Well, I call your attention to them.

A. If they are there I gave them to him.

Q. And they are there, aren't they, Mr. Wild?

A. That is 1942?

Q. Yes. A. You was referring to 1941?

Q. I am referring to 1942, this statement.

A. Well, that's right.

Q. And they are there, are they not—"Silent Julie—\$800 win—\$1200 cost"?

A. I take your word for it that they are there.

Q. Don't take my word; just examine the sheet and tell us if it so states. [519]

Mr. Belli: He has testified to that. I think he has answered that, your Honor.

The Witness: A. They are there.

Mr. Campbell: Q. They are there, is that right?

A. Yes, that's right.

Q. Now, in 1943, I call your attention to the sheet from which your return was prepared for that year, "Silent Julie Expense \$1250—purses \$1,-

(Testimony of Julius Wild.)

157.25''. Was that information you supplied to Mr. Callahan? A. I did.

Q. That was accurate information which you supplied to him, was it? A. Yes, it was.

Q. During 1941, '42 and '43 you were carrying certain life insurance, both on yourself and on Mrs. Wild, were you not? A. I was holding?

Q. You were carrying life insurance?

A. Well, life insurance—?

Q. And you also had some for your wife, did you? A. She had some for herself.

Q. I will ask you if it is not a fact that during the years 1941, '42 and '43 that you paid on account of premiums on those policies the amount of \$901.79?

A. I don't recollect that, at all. In fact, I think the premium was paid up. That may have been premium on the horses [520] that I had insured.

Q. Did you have any recollection of paying on life insurance that amount?

A. If that was paid Mrs. Wild paid it. I did not.

Q. Were those premiums paid by either you or Mrs. Wild during that period, 901.79?

A. For life insurance?

Q. For life insurance, yes.

A. I don't remember that.

Q. I beg your pardon, I gave you the wrong figure. A. Sure you did.

Q. Let me ask you this: Isn't it a fact that you paid during 1941, '42 and '43 the sum of \$246.60?

(Testimony of Julius Wild.)

A. Now, that would be right.

Q. To the Reliance Life Insurance Company on policy 321085, at the rate of \$82.20 per year, being paid in three payments of January, 1941, '42 and '43?

A. Could you tell me the insurance company, and how big the policy was?

Q. The Reliable Life Insurance Company.

A. \$5000 policy, was it?

Q. Whatever it was.

A. I want to know what I am answering and on what policy, because I sold two or three policies.

Q. Yes, I will furnish that. That is a policy in the amount of [521] \$2500.

A. Reliance—that is Mr. Krakauer, who, I believe, paid them for me.

Q. A 20-pay life policy.

A. Mr. Krakauer, I think, paid them for me out of my money.

Q. And your recollection is that those premiums were paid, is that right? A. They were.

Mr. Belli: Was that, then, Mr. Campbell, \$246, the total amount in insurance premiums paid during this period of time?

Mr. Campbell: \$246.60, paid in three payments of January, 1941, '42 and '43, at the rate of \$82.20 per year.

Mr. Belli: And the face value is what?

Mr. Campbell: \$2500, and that is for the Reliance Life policy, to which I refer.

Q. Now, Mr. Wild, do you recall during the years 1941, '42 and '43 you and your wife paid to

(Testimony of Julius Wild.)

the Collector of Internal Revenue on account of income taxes the total sum of \$901.79? To refresh your recollection, in the following payments on account of the liability of Emma Wild, February 21, 1941— \$24.40; March 4, 1942—\$32.81; on account of Julius Wild, March 11, 1941—\$97.20; March 10, 1942, \$71.25; April 7, 1942—\$19.41; June 8, 1942—\$99.41; September 4, 1942—\$80.59; September 15, 1943—\$413.19; June 15, 1943—\$63.53, or a total of \$901.79. Do you recall that? [522]

(Addressing Mr. Belli): Do you wish to stipulate to that, Mr. Belli?

Mr. Belli: It is already in evidence without asking him. It is on the return.

Mr. Campbell: No, these are the actual payments received by the Collector.

Mr. Belli: They are on the returns, aren't they?

Mr. Campbell: I will show you the certificate of assessments and payments.

Q. Do you recall, Mr. Wild?

Mr. Belli: Do you have a copy of this?

Mr. Campbell: I think there is a duplicate.

Mr. Belli: I would like to give a copy to Mr. Bougher.

Mr. Campbell: If there is no objection I will offer this as Government's Exhibit next in order, the certificate of assessments and payments of the Collector of Internal Revenue for the First Collection District of California, relative to payments received during 1941, '42, and '43 on account of Julius Wild and Emma Wild.

(Testimony of Julius Wild.)

Mr. Belli: We will so stipulate.

The Court: So ordered.

(The document was marked U. S. Exhibit 17 in evidence.)

Mr. Campbell: Q. Mr. Wild, during 1941 or 1942 did you in connection with a betting transaction receive a diamond ring which was afterwards disposed of, or on which you afterwards [523] borrowed the sum of \$900 in connection with the transaction at Caliente? A. I think I have.

Q. When was that transaction?

A. Sir, there were so many—if you had all mine you would have five or six transactions in them years.

Q. Well, can you give us five or six transactions?

A. It would be hard for me to give you any of them, what time or what date.

Q. What I am referring to is the transaction relative to the diamond ring of the value of \$900.

A. How big was it, please?

Q. For the purpose of refreshing your recollection I call your attention—first, you gave testimony on June 28, 1946, to the special agent: Do you recall that, Mr. Wild?

A. I was twelve hours with him. I certainly do recall it.

Q. Do you recall whether or not you obtained a ring at Caliente on a loan which was not made good by the borrower of \$900 in 1941?

(Testimony of Julius Wild.)

A. What size was the stone, please, and then I can tell you if it is accurate.

Q. I am going to call your attention to this statement initialed by you. Can you read that? It is in very small handwriting.

(Paper handed to witness.) [524]

Do you recall that you did receive a diamond ring on an obligation of \$900? A. \$900?

Q. Yes. A. I remember that.

Q. What year was that, that you received that?

A. I would say that was about 1941 or 1942. I can't tell you the year.

Q. Did you have that diamond ring still at the end of 1943?

A. I may have, but it has been—

Q. How big a stone was that, Mr. Wild?

A. That is what I am trying to get out of you, here. That should be there and I can explain all the transactions.

Q. I am asking you.

A. I don't know which one you are referring to. I know I borrowed the money.

Q. What one were you referring to when you said you received a diamond ring at Caliente in 1941 or 1942.

A. At Caliente when I was booking—and I have to explain that to you—if a player I knew wanted to bet and I knew his credit would be good to a certain amount, if he gave me security I would take it and I would allow him so much, and if he didn't take it out, I would allow him so much, and if he

(Testimony of Julius Wild.)

didn't take it out, it was mine in 30 days. If he took it out, no interest.

Q. This was one that was never taken out?

A. This is 1946 that was not taken out, but I don't know whether you refer to that, or not.

Q. Did you obtain one in 1941 or 1942 which you still had at the end of 1943?

A. That I couldn't answer.

Q. You don't know when?

A. I don't know when, but I had diamonds all the time. Of course, I can't really tell you which one that would be. If I knew the size I could tell you. That may be the stone that Artichoke Joe had in his safe deposit box in that year.

Q. Do you know what Artichoke Joe had in his safe deposit box?

A. No, but he called me to come up and get it.

Q. Was that a stone you had obtained in those years that Artichoke Joe had?

A. It may have been.

Q. Now, what bank accounts, Mr. Wild, did you have on January 1, 1941?

A. Well, to the best of my recollection, downstairs here—I mean at the Whitcomb Hotel, American Trust, and I don't know whether I closed that out, or not, at the Day and Night Bank, or if Mr. Krakauer deposited and took cash.

Q. It is a fact, is it not, as of January 1, 1941, there were two savings accounts at the Day and Night Branch, one joint account and one account in the name of your wife? [526]

(Testimony of Julius Wild.)

A. What my wife had I don't know. We were still on moritorium in 1941 and 1942.

Q. You had your own savings account there in your name? A. I did.

Q. Account No. 220, in which the balance as of January 1, 1941, was \$352.25, is that right?

A. Well, I had it and I can't say about the number 220. I don't know what number my book was, or my account.

Q. But would you say that balance, \$352.25 is corerect?

A. If you have it there it is corerect.

Mr. Campbell: May we stipulate as to that amount, Mr. Belli?

Mr. Belli: We will so stipulate.

Mr. Campbell: All right.

Q. You heard your wife's testimony as to the savings account in her name that had \$3537.25?

A. If my wife told you it was correct, it is, but I didn't know it.

Q. Both of those accounts were closed out prior to December 31, 1943, and you transferred your savings account to the Bank of America at Redwood City, is that right?

A. Sir, Mrs. Wild did—well, that is us in 1943—that is what you are referring to?

Q. Yes.

A. But at no time did I know what Mrs. Wild had in our marriage [527] lives.

Q. All right, sir, but at any rate those savings accounts at the Day and Night Branch were closed out before the end of 1943, weren't they?

(Testimony of Julius Wild.)

A. In the Day and Night Branch?

Q. In the Day and Night Branch, yes.

A. Mine, I think, was closed out way before that, but when Mrs. Wild closed hers out I don't know.

Q. I see, all right. You and Mrs. Wild opened a savings account down at the Bank of America at Redwood City when you moved down there, didn't you? A. I signed some papers.

Q. Yes.

A. And I don't remember even signing that. She made a joint—you know, that account to draw on.

Q. And there was a balance in that account, being account 298 in the amount of \$1992.24, as of December 31, 1943, was there not? (Addressing Mr. Belli) Do you wish to stipulate to that?

Mr. Belli: Any of those figures you have that check.

Mr. Campbell: These are verified figures.

Mr. Belli: I will stipulate to that.

Mr. Campbell: It will save us calling a witness.

Mr. Campbell: Q. Mr. Wild, you had a commercial account at the American Trust Company at the Civic Center Branch, with your balance in that account of January 1, 1941, in the sum of \$142.75?

A. I don't know.

Mr. Campbell: Will you stipulate to that, Mr. Belli?

Mr. Belli: I will stipulate to all of it.

Mr. Campbell: And that that account was subsequently made a joint account in the name of Jul-

(Testimony of Julius Wild.)

ius and Emma Wild, and that is as of December 31, 1943, there was a balance of \$2,108.82. So stipulated?

Mr. Belli: Stipulated. If your Honor please, as I am stipulating as to the correctness of this, if there is anything that you wish to add, that these are not correct, you interrupt the stipulation because I don't want to stipulate to any of this if you have any explanations that are not correct, you understand, Mr. Wild? A. I do, Mr. Belli.

Mr. Campbell: I will represent the figures given are taken from the records of the various bank accounts.

Mr. Belli: Just so he knows what we are stipulating to.

Mr. Campbell: Yes, I understand.

Q. Now, during the period of 1941, '42 and 1943, you and Mrs. Wild purchased certain savings bonds, did you not?

A. You mean Government bonds? [529]

Q. Yes, Government savings bonds.

A. I don't remember buying any in 1941. I bought bonds, that's it.

Q. After January 1, 1941, and you bought some before December 31, 1943? In that period you bought bonds? A. I did.

Q. Is it correct that as of December 31, 1943, the cost price of bonds which were then held in the name of you and Mrs. Wild, either jointly or individually, amounted to \$4,012.50?

(Testimony of Julius Wild.)

Mr. Belli: Our account shows a little more than that, \$4,387.70.

Mr. Campbell: We will accept your figure.

Mr. Belli: All right, take that. We have a lot left over here.

Mr. Campbell: Four thousand and what?

Mr. Belli: \$4,387.70.

Mr. Campbell: All right, so stipulated.

Q. Now, you heard the testimony of your wife yesterday, that the purchase of the house was \$7,500. Is that the correct amount?

A. That is correct.

Q. That was purchased in 1943, is that correct?

A. We moved in the first of April of 1943.

Q. And the full purchase price was \$7,500?

A. \$7500 cash, don't forget that—cash. [530]

Q. Paid for at the time you purchased it?

A. It was paid before we went into it.

Q. Now, Mr. Wild, Julius Krakauer left your employment, as I recall, in September of 1943?

A. That's right.

Q. Around the middle of September, if I am not mistaken.

A. No, it was about the 25th or 27th. It was pretty near the last day of September.

Q. I notice the last card here—yes, the 25th of September? A. That's right.

Q. That was a Saturday night?

A. That's right.

Q. That was on a Saturday that he left you there?

A. I can not recall whether it was a Saturday

(Testimony of Julius Wild.)

or what it was, but that is as close as you can get to the date.

Q. After he left, the operation of the room continued, did it?

A. The operation of the big room may have continued, but not very long. I am trying to get it out.

Q. Yesterday you said that you closed up finally and completely in September of 1944, a year later, is that correct?

A. Well, not the two operations of that room. The front room—when it was closed there was no operation, but I always was in my back room. They would come down the elevator and come to my back door.

Q. Can you state at this time whether or not you continued the [531] operation of what you call the front room during October, November and December of 1943?

A. That I can not remember, I can not recall. The only thing I can recall is that I paid him a salary and took it on myself that they did their duty, and they were entitled to a salary and I can take the beating. Whether I was open or closed, I can not tell you, but I knew they drew the salary.

Q. Was there a raid there at about the time Mr. Krakauer left and you were closed?

A. No, there was no raid when Mr. Krakauer—well, there was a couple of raids just before he left, but they came right in a row, one week and then the next week, but the date I don't know. But

(Testimony of Julius Wild.)

that was not no friendly raid, either, or any tip-off of the raids, what you call them.

Q. That was after he left?

A. No, before he left.

Q. You were never arrested on those occasions, were you?

A. Oh, once or twice I would go up there.

Q. You would go up? A. Sure I would.

Q. On the other occasions some employees would go up?

A. Three or four of them would go up.

Q. What was done: you posted bond or you paid bond, is that correct?

A. No, there was a bond broker there waiting for me. That is [532] where some of that envelope money went.

Q. And they would be waiting for you when you went up there?

A. There was a fellow named Cookie, from McDonough Brothers, that was there waiting for me.

Q. He would be at the station house when you got there? A. With those releases.

Q. And you would go back to your operations the next day?

A. Well, that day we would close and we had—I had in my pocket—whatever the cost was I paid. If there was any boys went up there voluntarily, they got \$5 apiece. That came out of my pocket. That might be—Mr. Campbell, you might find some of those figures XX 45 and 35, that is referring to some of that.

(Testimony of Julius Wild.)

You are bringing me right to the facts of the case.

Q. Those refer to the expenses you had in there with those raids?

A. Some of them are on the raids.

Q. And you would pay them something for having gone up there, is that right? A. Sure.

Q. And so what was done there, the bond was posted and forfeited, is that right?

A. That's right.

Q. You never paid any fine or anything of that kind on those matters, did you, during that period?

A. Did I? [533]

Q. Yes. A. Personally?

Q. Yes. A. No.

Q. Now with reference to your investment in the Jockey Club at Bay Meadows, that was all made prior to 1941, as I understood Mrs. Wild, is that right? A. What Mrs. Wild told you is right.

Q. And as I recall, your initial stock was purchased back at the time the track was being built, back about 1934, somewhere in there, is that right?

A. Well, I purchased some of that six months before they shoveled a dirt shovel.

Q. Incidentally, what was your investment in that, how much was paid altogether for the stock?

A. You mean what was Mrs. Wild's and I investment in that?

Q. Yes, together.

A. First, it was around—now, let's see, I have to tell you two pictures:

(Testimony of Julius Wild.)

First I had a credit with the best friend I have ever had in my life, William F. Kyne, \$12,500 or \$13,000, that is before Bay Meadows because he needed money and so did I. So the result was, when the track was built, he paid me back \$2500. I had to take it \$10,000 in stock.

Q. And that represented what? [534]

A. 100 shares of Bay Meadows, California Jockey Club.

Q. You bought some additional shares afterwards through Mr. Benn?

A. Benn, 10 shares. The reason he had to sell—

Q. We are not interested in that. What did you pay for those ten shares?

A. I think around 60—60 or 65.

Q. Per share, is that right?

A. Either \$600 or \$650 is what I gave him, in other words.

Q. But that was all before 1941?

A. That's right.

Q. During the period here, 1941, '42 or '43, you did not sell any of the stock you had, or buy any more stock, in the Jockey Club?

A. In the California Jockey Club?

Q. That's right, isn't it? You held onto what you had?

A. All I ever done is borrow money on it. No, I never sold it.

Q. That's right. I mean, you did not buy any more?

A. That's all we got, yes.

Mr. Campbell: All right, that's all.

(Testimony of Julius Wild.)

Redirect Examination

Mr. Belli: Q. When you borrowed at various times from these various people, did you tell them that you had this Jockey Club stock and this Orpheum Theater stock? [535]

A. Did I tell who?

Q. The people that you borrowed from.

A. Sure I did.

Q. They did not make you hypothecate it or put it up, did they?

A. Not my friends, no. Julius Krakauer had it once, for some 60 shares he had for security, when he loaned me some \$3,000.

Q. Julius Krakauer was the only one of your very good friends that made you put this up as security, right?

A. That is true. He had to have something.

Q. Now, in the statement that was referred to by Mr. Campbell, that was taken on the 28th of June, you were also asked this question and answered with reference to your taxes—just one line before that:

“Q. Mr. Wild, do you gamble in other forms than horseracing, such as dice, poker, slot machines, et cetera?

“A. Not much of that. When you go on a spree you play everything.

“Q. Is there anything further you wish to add to this statement in order to clarify your income tax liability for the years 1941, '42, '43 or '44,” and you answered—

(Testimony of Julius Wild.)

Mr. Campbell: I am going to make an objection to this, if the Court please, as not proper examination of this witness who is on the stand. He should be asked the direct question. [536] There is no relevancy or materiality here as to any self-serving declarations he made or may have made on another occasion.

I object to this matter being read in this fashion.

Mr. Belli: If your Honor please, part of the statement was read here. I think we are privileged to read the whole statement. I don't care to read the whole statement—

Mr. Campbell: No, I think counsel is mistaken. He was shown a portion of that statement, to refresh his recollection as to a diamond ring, but certainly under this method a self-serving declaration can not be introduced into evidence.

Mr. Belli: It is not a question of self-serving.

The Court: Objection overruled.

Mr. Belli: Q. You were asked about your taxes. Is there anything further you wish to add to this statement—you were being questioned by Mr. Burkett:

“A. It is hard for me to say where I got the money or who paid me. If I had the book, I could tell you. I came up here without any mouthpiece. I came up here clear in my heart. I have done a lot of things, but what man hasn't? I have gone haywire. I have gambled. If I had the book, there might be things I can't recall. If I had my book I could tell you everything.

(Testimony of Julius Wild.)

“Q. It is our understanding that if you find the book you will turn it over to us? [537]

“A. I absolutely would. There is a lot of personal things for you to look over and check up.”

Now, when you went up there on June 28, 1946, and you used this dramatic expression about your mouthpiece, you did not go up there with any lawyer or anyone else, did you? A. I did not.

Mr. Belli: That’s all, Mr. Wild.

Mr. Campbell: That’s all.

Mr. Belli: If we can call Mr. Burkett, he might be able to straighten up a couple of problems we have in our minds on some figures. Would you take the stand, Mr. Burkett, please?

WILLIAM BURKETT

recalled; previously sworn.

Further Cross Examination

Mr. Belli: Q. Now, these cards which the Government has, were the exhibits from which they computed the income tax that Mr. Wild should have paid, aren’t they? A. Yes.

Q. Now, these cards are only for the Saturday. They are not for the Monday, the Tuesday, the Wednesday, the Thursday or the Friday, are they?

A. That is not correct, Mr. Belli.

Q. Do you have all the days of the week in here?

A. Yes. The top part is Saturday, the bottom part is a recap [538] of six days.

Q. Well, but you don’t have the cards for those

(Testimony of William Burkett.)

six days, the Monday, Tuesday, Wednesday, Thursday and Friday, do you?

A. No, we made that on the week's recap.

Q. All you have is Mr. Krakauer's word of what he put down here?

Mr. Campbell: Just a minute—

Mr. Belli: Q. —that that was correct for Monday, Tuesday, Wednesday, Thursday and Friday, is that correct?

Mr. Campbell: Object to that as argumentative, if the Court please.

The Court: Overruled.

The Witness: There is Mr. Hughes and Mr. Krakauer, and you add Mr. Hughes and Mr. Krakauer together and you get the final amount on the cards.

Mr. Belli: Q. But I take the card on top here. This is Saturday, isn't it?

A. That is Mr. Hughes' writing.

Q. All right, take the whole card. This is Saturday, right? A. The top part is Saturday.

Q. Yes. Now, I turn to this card here, and this is Saturday's card, too, isn't it?

A. That is Saturday's record, yes.

Q. In other words, there is nothing in here of a Monday, Tuesday, Wednesday, Thursday or Friday? [539]

A. Oh, yes, you add the whole total to Saturday's and you get the recap for the week of Mr. Krakauer and Hughes.

Q. Didn't Mr. Krakauer tell you that he kept

(Testimony of William Burkett.)

cards for Monday, Tuesday, Wednesday, Thursday and Friday?

A. So did Mr. Hughes, both of them did.

Q. What did Mr. Krakauer tell you he did with those cards?

A. Just what Mr. Hughes said: They added them and they carried them over to the next day, and that is what Mr. Wild said.

Q. Did Mr. Krakauer tell you he threw those away?

A. Mr. Wild said he tore them up, and Mr. Hughes said he gave them to Mr. Krakauer, and Krakauer to Wild and Wild destroyed them on account of he did not want the police to have them.

Q. Up in the top of these cards, on every one, for the three years, it appears to have the same colored red pencil, in the same handwriting, as you go all the way through, doesn't it? See what I mean: red, same handwriting, all the way through there?

A. I am not an expert in handwriting, Mr. Belli, but I can see that it is red.

Q. For three years in the same handwriting. Let me ask you now, with reference to the totals that you got: The gain for the week was just arrived at by totaling the items—no, I mean the profits for a period, on what you computed that he should have paid taxes; did you arrive at the profit by totaling the items "Gain for the Week" shown on these cards? [540]

Do you understand what I mean on that?

(Testimony of William Burkett.)

A. I did not get your question, Mr. Belli.

Q. Very well, I want to be clear on this, too. I am not very good at figures or computations myself, but I want to be certain we have gotten your method of computing the taxes here.

In order to get your net profit that you say that he had, from these cards, did you arrive at that by taking the items "Gain for the Week," for all of these cards here, and adding them all up?

A. Well, we had the gross take, the total bets placed on these cards every day, then we add your operating expenses, including pay-offs, they are on there.

We had Wild's salary or his drawings which are on those cards.

By taking your operating expenses and subtracting them from your gross take, why, you get this for his salary, which is really net, and you get the profit or loss for the week.

Q. Well there is a difference in here of some \$14,000 between my computation and yours. So that we will be clear on this—maybe the way we have gone at it—on these cards there is an indication of how much was taken in, let's say \$100. Then there is an indication of various items of expense, salary, rent, janitor, pay-off and the rest of it.

Let's say that came to about \$50, all of the items of expense on the card, as indicated. So I understand you then [541] subtracted from \$100 the \$50, as was done by the man who computed the cards,

(Testimony of William Burkett.)

and that would give you then the \$50 profit on that card.

You would take that \$50 profit, and do the same with all the rest of the cards, and get a cumulative total of all of the cards here, taking everything that came in, and all expenses, taking them out, as indicated on the cards, and the result would be the figure that you arrived at as Mr. Wild's profit on which he should have paid taxes.

Mr. Campbell: I object to two matters: first, I object to counsel's statement that there is a \$14,000 difference between our computations, there being no such computation in evidence here.

Mr. Belli: We will withdraw that and prove that.

Mr. Campbell: Secondly, I object to the question itself as being unintelligible.

The Court (To the Witneess): Do you understand the question?

A. I would say it is unintelligible, but I can understand one thing that is left out, is the losses. Sometimes the weeks he would lose altogether, you have to deduct that, but the question is pretty vague itself.

Mr. Belli: Let's put it on the board so that there will be no question on it. May I, Your Honor?

The Court: Yes. [542]

The Witness: Why not just take a card and let's work out one card.

Mr. Belli (At the blackboard): You have got cards to start with here, for three years, haven't you?

(Testimony of William Burkett.)

A. Yes, with the exception of one year, there is only nine months, and in 1941 you have only ten months, taking the profit and loss for ten months. In 1941 and 1942 you referred to all twelve months here, and in 1943 we are only taking nine months, so it is not all three years.

Q. But in any event, these are the cards from which you computed Mr. Wild's taxes, is that right?

Mr. Campbell: That is objected to. This witness has not computed taxes. He has computed the income from these cards and the profits on those cards, but not the taxes.

Mr. Belli: I understand the taxes are paid upon income, am I right?

(No reply.)

Mr. Belli: Q. Let's take the card as it appears: let's say that you have \$100 there.

The Court: The witness suggested, Mr. Belli, rather than take the hypothetical figure of \$100, that you accept one card, and work from the card. I think that would be easier for the Court as well as the jurors, if it is agreeable in your examination. I am not attempting to limit you at all.

Mr. Belli: I thought I would do it this way, and then the [543] other way will be a lot simpler. We will try it anyway.

Q. Here we have \$100, so let's say that was what was taken in, right, during the day?

A. You mean gross total bets placed?

Q. The same as a cash register in a grocery store, yes. All right, then let's say Julius paid out,

(Testimony of William Burkett.)

on bets, around, let's say, \$30. That would be a pay-out on bets. I am going to give him a gain on this day's business here. He paid out \$30 on bets. He had \$10 to pay off, and \$5 for janitor, and \$10 for another item on the card, and we are assuming here that we have taken every item that appears on the card, by the man that made up the card, as deductible items.

In other words, whether it was paid off or whether that is deductible or not, whether the lights and gas and oil and the rest of that was deductible or not, the man, on the card, deducted those, so we are going to do the same way that he did.

This is what came in, \$100, and this is what went out, whether pay-off or Greek relief or anything else you want to call it, including the bets that he paid out.

So you have \$55 paid out.

Then for that day he had a gain of \$45, right? I mean, is that roughly the way it was done here, and is that the rough way you computed it?

Mr. Campbell: We object to that. The record speaks for itself. [544]

The Court: I will allow it.

Mr. Belli: To me it seems so simple. Do you follow that point?

A. Yes, if you get everything there, if I understand your question, that all expenses are in there, including his salary, on the income side, and all on the outgo.

Mr. Belli: Yes.

A. \$55 from \$100 is \$45.

(Testimony of William Burkett.)

Q. Anything you have there, if it is paid out, whether it is pay-off or anything else isn't that right? A. Everything on the card, yes.

Q. Then you take that off from the bets and you paid this much out, \$55, is that right?

A. Yes.

Q. And that left him \$45? A. Yes.

Q. If you would go through all of those cards, out of the total that you got, were the totals of gain or loss comparable to this sum for each of the Saturdays on these cards? You did not reconstruct any cards for a period that was not available by cards, did you?

A. As I said before, Mr. Belli, we verified that Saturday, added to the Friday total, to make the bottom weekly recap card.

That was Mr. Hughes' testimony, Mr. Wild's testimony and [545] Mr. Krakauer's, that that was their system, so that is what we had to go by.

There were a few minor errors in addition, but it came out that the final computation as reported from those cards, as I testified the previous day, would be correct.

Q. Let me ask you my question again:

You did not reconstruct any cards for any periods that were not here? There were some periods that were not here? There were some periods for which there were no cards?

A. That's right, Mr. Belli.

Q. You did not reconstruct them?

A. No, they were gone.

Q. You only took the actual cards?

(Testimony of William Burkett.)

A. Yes, sir.

Q. And you went through the cards for each Saturday, of the number of cards that you had there? On your adding machine tape you had whatever sum was, that was taken in, plus the expenses, which would give you a figure, and that figure would be gain or loss for that week, that Saturday, wouldn't it?

A. There are two figures, one at the top half of it, and one for the week at the bottom. We verified both.

Q. Then you would add all those together, so the total profit would be the adding together of all of the figures on each of the cards, showing the gain or loss, right?

A. Yes, and sometimes we would subtract, where he had lost a [546] week, and we gave him a loss on that.

Q. And that gave you those figures in your exhibit here? That would give you the figure of \$16,932 for 1941, \$34,001 for 1942 and \$30,653 for 1943. Am I right on that?

A. Yes, and we would not allow the pay-off, so the correct total is that.

Q. But the top figure here, this one in this exhibit by the Government, No. 13, these figures here, \$16,000 and \$34,000 and \$30,000, those are with all of the deductions that were taken by the man who computed the cards, is that right?

A. That's right.

Q. You are sure of that?

(Testimony of William Burkett.)

A. Well, there is no doubt if your question—if there is nothing hidden in there, it is the exact answer.

Mr. Belli: You are the one to take the question and ferret out anything hidden.

A. Well, read it, please.

Mr. Belli: You read it to him, Mr. Reporter, and if you have any question or any doubt, you ask me the question, because I am going to put my accountant on the stand. Maybe you can help me out on it, if I haven't done it the right way, or if we haven't got the right computation here.

A. The computation is correct. The explanation of it, I will be glad to give you again.

(Thereupon the question was read by the Reporter.) [547]

A. I don't understand your question, Mr. Belli.

Q. Well, I am taking the same language that you had in Government's Exhibit 13. You had "net profit from horse race business after deducting all expenses."?

A. Yes.

Q. Maybe we can approach it this way: What does that mean, "after deducting all expenses?"

A. That means all operating expenses. In detail, that means papers, run-down sheets, forms, radio, janitor, salary—the salary for the other employees. We did not allow Mr. Wild's salary on it. We put that in as income.

Then the profit, after paying out all the bets, the losses, we arrived at the weekly net profit that

(Testimony of William Burkett.)

is reflected in this exhibit that you have just shown me.

Q. When you say here, "after deducting all expenses," you did not deduct all the expenses?

A. It did not give him the pay-offs.

Q. Well, you say that you did because down here—

A. No, we added the pay-offs to it (indicating).

Q. But up above it, on this schedule, you included the pay-offs at the cost of doing business, didn't you?

A. You are referring to one part, but the total net profit is at the bottom of the page, \$17,982 for 1941; total net profit, \$35,261 for 1942, and total net profit for 1943, \$31,598. [548]

Q. All right, now there is a figure here of \$16,932 for 1941 and \$17,982 for 1941.

They are both for 1941, but the smaller figure of income is arrived at by allowing him the amount of money that he paid for pay-offs, isn't it?

A. I cannot see what you are referring to there. Mr. Belli: I am sorry. (Indicating)

A. We didn't—the top part of this exhibit—apparently he thought payoff was an allowable expense, and as was explained to him before, we do not allow, as public policy, the protection thing, so we took that figure and added on \$105 a month for every month that he was operating. That is how we reached the total net profit.

Q. I understand. So this figure here then at the top of the page, this computation of \$16,932

(Testimony of William Burkett.)

for 1941—have you got that? A. Yes.

Q. Then for 1942 there is a total of \$34,001 (Indicating), then your \$30,653 for 1943. Those three totals are for 1941, 1942, and 1943.

The total net profit which you have indicated in those three columns there, you arrived at by giving Mr. Wild all of the deductions that were given to him by the man who computed the cards, including payoffs and everything else, is that right? [549]

A. That is including payoffs, which we did not allow.

Q. I understand that—because down at the bottom you computed it higher when you did not allow the payoffs. Do I understand then, that even on a venture like this, and I use the vernacular, Uncle Sam is in partnership with the bookmakers, and as we have elicited, and apparently it is necessary to pay off in order to run one of these businesses, and yet Uncle Sam does not allow the expenses for the payoff in order to keep the business running.

Mr. Campbell: I ask that the statement of counsel as to partnership in the bookmaking business be stricken and the jury ordered to disregard it.

Mr. Belli: Well, whatever you want to call it.

The Court: The objection to the question is sustained. We will take the recess. Mr. Witness, in the interim during the recess, if there is any explanation you desire to make, or any interrogation regarding the figures, is that what you call a breakdown of the figures, isn't that right? A. Yes.

Q. An arithmetic computation?

(Testimony of William Burkett.)

A. Yes, sir.

Q. The figures, in terms of computation, merely demonstrate—as I understand it, and I am trying to understand it as well as the jury—the fact that the Government failed and refused to allow the items or the sums paid off for protection, [550] and added those sums to the ultimate figure showing the net, is that your understanding?

A. Yes, sir.

Q. And that is all the sum and substance of the examination, is that correct?

A. That is absolutely right.

Q. Have you anything to add to this so at this juncture the other jurors may understand it, for we are dealing with many other figures here.

A. No, sir.

Mr. Belli: May I suggest, your Honor, respectfully, that if the jury have any questions to ask the witness—

The Court: Have the jurors any questions at this juncture? In all fairness, in cases involving arithmetic, computations, and the like, with many exhibits, the jurors may be misled. It is very often possible for Courts to be misled. The human machine, the brain, can only assimilate so much of the time, and the trial of a case is not any exact science, as you have found.

Do you have any questions concerning the examination made of the witness on the stand in connection with arriving at the figures showing net income?

(Testimony of William Burkett.)

A Juror: I would like to ask about that \$105, if that net \$16,000—whether that had been taken out? A. That is correct. [551]

The Juror: And then afterward, having then added it back, is that right?

The Court: Yes—is that correct?

The Witness: Yes.

The Court: You explained how in the breakdown you took all of the figures: for the purpose of the original computation, you allowed it in, did you not?

A. Yes, when we were adding up the cards, we in a sense allowed it, up to a point, and then we came along, and as public policy did not allow protection money, we put on \$105. Because the witness paid out this money, they thought, as a protection expense, so that in the final computation, you are correct that that is the total net profit for the year.

Mr. Belli: I think, in fairness, I should say this, that even with that—in answer to the juror's question—that even with the protection money allowed as a deduction, it would still show, at the present stage of the case, that Mr. Wild's estimate was less than what it should have been.

Mr. Campbell: I ask that the jury be instructed to disregard that statement of counsel, that it is not supported by the record here, and that it is entirely out of order.

The Court: The jury is instructed and admonished to disregard that statement of counsel. There

(Testimony of William Burkett.)

is one other correction here: that hereafter perhaps a construction might be placed on your testimony that might not go justified, when [552] you say you allowed \$105 in the first instance in your computations, you merely intended to convey to the Court and the jury, I assume, that in the computations from the cards, as you went down the cards, you allowed, as integrated in your computation, the sum of \$105? A. That's right.

Q. But in no legal sense did you allow \$105, is that correct? A. That's correct, absolutely.

Q. So that the word "allowed" is used in that sense? A. Yes, sir.

The Court: Now we will take the recess. Do not communicate with anyone or suffer or permit anyone to converse with you on the subject of this trial until this case is finally submitted to you for consideration.

(Recess.) [553]

The Court: You may proceed.

Mr. Belli: That's all I have, Mr. Burkett. Thank you very much.

Oh, just the one further thing that you called to my attention and that I almost forgot:

Q. You did not include, did you, that Mr. Wild charged that salary, his own salary of \$10 a day. You didn't include that in your computation on the top part of Government Exhibit 13?

A. If you are questioning me as to how I arrived at the total for the year, as I explained before, the payoffs of \$105 for 10 months, for example

(Testimony of William Burkett.)

1941, were not allowed. There is \$1050 and the cards themselves show a net of \$13,539, for example for 1941 and thence Mr. Wild's own salary \$3393, which he threw back into expenses. It is not expense, it is a profit to himself. So, adding up \$3393 as salary and expense as reflected by the cards, \$13,539, and the payoffs of \$1050, would be a total net for the year profit of \$17,982, out of the entire gross receipts of nearly half a million.

Q. Specifically, in answer to my question you didn't include the salary Mr. Wild paid of \$10 a day to himself when you arrived at the top figures of Government Exhibit 13?

A. The top figures of the day, Saturday, and the bottom is the recap of Mr. Hughes—

Mr. Campbell: Are you talking at cross purposes? Are [554] you referring to the card and exhibit, and is the witness referring to the card and exhibit as to the "top figures"?

Mr. Belli: No, this is Government Exhibit 13.

Q. Am I correct in this, Mr. Burkett, that nowhere in Exhibit 13 was Julius' \$10 a day salary allowed?

A. Your total for the year, take 1941, is \$17,982, is that right?

Q. Yes.

A. That is made up of \$1050 for payoffs that were not allowed, and expenses \$13,549 as reflected by the cards and also if you add up the cards you will find in addition \$3393 for salary; and so his entire net profit to himself, take-home, is \$17,982.

(Testimony of William Burkett.)

Q. Let us come around backwards and approach it this way: the bottom figures on Government Exhibit 13 disallow protection payments and disallow and dollars paid to himself—right or wrong?

A. We allowed the profits.

Q. But it is disallowed to him as a deduction?

A. Yes, disallowed as a deduction.

Mr. Belli: That is all. Now, if you have any further explanation of anything here that was not clear, I give you carte blanche to make it. [555]

Redirect Examination

By Mr. Campbell:

Q. As to the method you use, we will take as example this card number 1 of Government Exhibit number 7, the first card in the three groups. There is set forth on this certain expenses, isn't that correct?

A. Yes, sir.

Q. And those expenses are deducted from the day's profit to arrive at the net profit for the day, is that right?

A. That's right.

Q. And there is accumulated on the bottom of the card a profit for the week, is that correct?

A. Yes.

Q. However, before arriving at that profit for the week there has been also deducted as an expense the \$10 a day paid to Mr. Wild, is that right?

A. Yes.

Q. And there has also been deducted in arriving at that net profit the \$185 a month to which reference has been made, is that correct?

A. Yes.

(Testimony of William Burkett.)

Q. So in arriving at your monthly figures here, the figures here, for example, for January 1941, for \$1474, is the profit shown by the cards including the salary paid to Mr. Wild, is that right?

A. That's right. [556]

Q. And for the year the \$16,932, that is the same, is that correct? A. Yes.

Q. Although, Mr. Wild on these cards shows a salary and takes it as an expense, is that right?

A. That's right.

Q. So, your sum of \$16,932 is allowing every expense which is claimed on these cards except the salary to Mr. Wild? A. That's right.

Q. At the bottom you have taken your figure \$16,932 and you have disallowed the expense of \$1050 paid in 1941 for so-called protections, is that correct? A. That's right.

Q. So that the correct year's net profit which you have found due Mr. Wild is the sum at the bottom of \$17,982, is that correct?

A. That's right.

Mr. Campbell: That's all.

Mr. Belli: Thank you, Mr. Burkett.

The Court: Did you ever attempt to rationalize or effect a breakdown between the report as submitted by Mr. Wild and go over the figures, to work out a comparative analysis?

A. Percentage net profits versus the amount of gross bets placed, you say sir? [557]

The Court: Q. That might be illuminating. What would that run? About 7 percent?

(Testimony of William Burkett.)

A. We figured his gross receipts or total bets placed was nearly half a million, or \$386,101, and his salary, net payoff, would be about 41½%.

Mr. Campbell: Q. Would that run constantly, each year, Mr. Burkett?

A. That is 1941. In 1942 the gross play—

Q. No, the percentages. A. Six per cent.

Q. And in 1943, what would it run?

A. In 1943, 6 per cent.

Mr. Belli: Q. Does that mean he made six per cent on his business?

The Court: Q. On the gross turnover?

A. On the gross turnover versus the gross play.

The Court: Q. So that the Court and the jury may understand the difference between the figures as braced in the return submitted by the defendant and his wife with the ultimate figures as compiled by you, the differential is comprised of items, no doubt? A. Yes.

Q. Could you particularize those items?

A. Well, the revenue agent that computed the tax from the return here could. If I had the returns, I could do it, but [558] I don't have them before me.

Mr. Belli: I thought there was an exhibit on that.

Mr. Campbell: It is a matter of addition and subtraction.

The Court: So that the jurors and the Court may not be misled, references made to the payoff items, so-called protection money items, as well as the salary, are there other items therein included above and beyond those two?

(Testimony of William Burkett.)

A. In expenses?

Q. Yes, sir.

A. Yes, sir. The expenses take in everything—soap, forms, radio, janitor, sheets, salary, papers, the loud-speaker system, rents, right, and everything that went into operating the place. In fact, we gave him the benefit as to these lawyers' fees, these raids and so forth, bail and what-not of double X's. We only took the \$105 payoff.

Mr. Campbell: Q. Possibly we can get at it this way, Mr. Burkett: Will you state with reference to Government Exhibit Number 1, the 1941 return of Mr. Wild, the amount he reported as net profit from business?

A. He reported in 1941 net income of \$3398.50.

Q. I am referring to the net profit from his business.

A. The net profit from his business is \$2370.

Q. What did you find his net income from business to be as computed by you on Exhibit 13? [559]

The Court: Based upon the cards in question.

Mr. Belli: Yes.

Mr. Campbell: Yes.

The Court: And they are not based on any other fact or factors—just **the cards**.

Mr. Belli: No, the cards don't include anything else.

The Court: All right.

Mr. Campbell: Q. I hand you Government's Exhibit 13 for ready reference. What do you find

(Testimony of William Burkett.)

his net income to be as reflected from the cards as you testified as having examined?

A. \$17,982.

Q. For 1942, referring to Government's Exhibit 2, what did he report his net income to be?

A. His net profit from his business he reported as \$4998.36.

Q. As reflected from the cards, Government's Exhibit No. 8, what did you find his net income from such to be? A. \$35,261.

Q. And as reported by Government's Exhibit No. 3, the return for 1943, what did you find his net income from business that he reported?

A. Let's see, dividends—income—\$5268.23.

Q. And as computed by you from Government's Exhibit 9 the cards with reference to 1943, what did you find his net income from business to be?

A. \$31,598. [560]

The Court: Now, there are 12 cards that have been referred to during the course of the testimony that Mr. Callahan had.

Mr. Campbell: Yes, your Honor.

The Court: Where are those 12 cards?

Mr. Campbell: The evidence here is that they were shown to the revenue agent, having been given to Mr. Callahan, and Mr. Callahan said he brought them back to the place of business after showing them to the agent, and that is the last he ever saw of them.

The Court: Is that the end of the 12 cards?

Mr. Campbell: Yes.

(Testimony of William Burkett.)

Mr. Belli: Yes, that is the end of the 12 cards.

The Court: Where are they?

Mr. Campbell: They disappeared. The last time they were seen was when Mr. Callahan brought them back to the place of business after having taken them in to substantiate these figures.

The Court: Those cards, according to the testimony of the witnesses, the expert witnesses who have taken the stand, in this case, assumed to fortify the '41 or the '42 return?

Mr. Belli: The '41 return.

Mr. Campbell: May I make this correction?

The Court: Yes.

Mr. Campbell: Not according to this witness.

Q. Did you ever see the 12 cards?

A. No, sir.

Mr. Campbell: It was the testimony of the revenue agent who was making the examination of the 1941 return and who requested records to be brought in. He said he examined the 12 cards and checked them, and they substantiated the 1941 return.

The Court: They substantiated the 1941 return in the amount of how many dollars?

Mr. Campbell: Which reports a net profit from business of \$2370.

The Court: As compared to the figures delineated this witness of how much?

The Witness: \$17,982.

The Court: Is that revenue agent in court, the man that actually saw the cards?

(Testimony of William Burkett.)

Mr. Campbell: That was Mr. Lippert. He is not here this morning, but can be produced.

The Court: But there is no question about that?

Mr. Belli: There is no question about that, but to be clear on that, the 1942 records that Mr. Callahan brought up here were these work sheets that are in evidence.

The Court: Yes.

Mr. Belli: And for 1943 these work sheets were brought up that were in evidence. The 12 cards only pertain to 1941. [562]

The Court: Yes.

Mr. Campbell: There should be no confusion on that. These were brought up in the present investigation. Mr. Lippert was involved in the investigation of 1941, and these records, particularly the second, could not have been in existence at the time of Mr. Lippert's examination in 1941. They were produced by Mr. Callahan and the evidence shows with relation to the present investigation.

The Court: That is your inference.

Mr. Belli: Just for the recapitulation.

The Court: But I merely wanted to recapitulate some of the evidence thus far adduced to the end that loose ends may not prevail at the end of the trial. You gentlemen of course are trying your own case.

Are there any further questions of this witness?

Mr. Campbell: No.

Mr. Belli: No.

The Court: That's all.

A. L. BOUGHER,

called as a witness on behalf of defendant; sworn.

The Clerk: Q. Will you state your name to the court and jury? A. A. L. Bougher.

Direct Examination

Mr. Belli: Q. Mr. Bougher, at my request you have gone [563] over some of these cards that were introduced by the Government?

The Court: By the way, will you examine his qualifications?

Mr. Belli: Yes, I am going to, but I was just going to put one question as to the investigation.

Q. You examined these cards, seven, eight and nine? A. I did.

Q. Before I ask you about those, I will ask you a little about yourself so the jury will know who you are. You are a public accountant in California, duly licensed to practice here, are you?

A. I am.

Q. And you specialize in tax work, do you?

A. To some extent.

Q. And you have your offices presently with me at the top floor of No. 240 Stockton Street, is that right? A. That's right.

Q. You do my tax work and my records in my place? A. Yes.

Q. You have looked at these exhibits in court, here, and you have made some computations on them, have you?

A. The computations were based originally on photostatic copies, but I have scrutinized these as well.

(Testimony of A. L. Bougher.)

Q. How did you make your computations for your totals of [564] your net profit for the three years—solely from these cards here of items, and what items did you take into consideration and what items did you add?

A. The bottom half of the one side of the card—

The Court: I think if he takes the card it would be better.

Mr. Belli: Yes, hold that up and point to it so the jury can see it, or take these apart again, sir. This No. 10 is all the same, is it, Mr. Campbell?

Mr. Campbell: Yes, those are only for identification.

Mr. Belli: These are the ones you showed for identification?

Mr. Campbell: Yes, No. 1 For Identification.

The Court: Are those the photostats?

Mr. Campbell: Yes.

The Court: Allow the jury to have them.

The Witness: I can work from this one card.

The Court: Q. You can work from this one card? A. Yes.

The Court: That will serve you as an example?

A. Yes.

Mr. Belli: Then I will show these to the jury.

Q. You have one in your hands there now?

A. No, but I can take the original.

Q. You have yours? [565]

A. No, there is one on the table, there.

Q. We are going to refer first to the side that has "DR" and "Credit" there, and a big "T" over on the left, is that right? A. Yes.

(Testimony of A. L. Bougher.)

Q. Now, go ahead and explain what you took into consideration in making your computations. I better ask you this question so I can see where we are driving, what we are driving at. Mr. Bougher, there was a difference in your computations from the computations of the Government on their Exhibit 13? A. There was.

Q. Now, tell us how, first, you arrived at your computation and we will find out what the difference was.

A. The bottom section of the side of that card, according to my understanding, purports to be—

Mr. Campbell: Pardon me, I have an extra copy.

The Witness: All right, thank you. In the right-hand column these figures purport to represent a weekly total of the various items and that marked “B” carried forward—

The Court: Just a minute, where is that mark “B”?

A. On the extreme left of the card.

Mr. Belli: Below the double line there is a “T” and “E” and “B”. A. Yes.

The Court: Q. All right, that is on the left-hand side of the card? [566] A. Yes.

Mr. Belli: Could I ask your Honor or the jury, if they don’t follow anything to call it to my attention.

The Court: We want this to be carefully followed, ladies and gentlemen.

Mr. Belli: Q. Go ahead.

The Witness: A. My understanding that the “B” stands for “Book”, meaning the business or

(Testimony of A. L. Bougher.)

balance of the cumulated total for this particular week. And \$145 plus \$43, which you will notice above, represents the gain for the day.

Q. Now, stop right there. When you say "You will notice above," you have to go up above the double line and you see a word that looks like "Tot gain." A. Total gain.

Q. And then a "Day" and then a dollar sign and a "43". A. Yes.

Q. All right, you take the 43 down and add that across from the "B", the \$145, is that correct?

A. That's correct.

Q. Now, going over to the right, across from the "B".

A. As I understand is \$188, but to my understanding purports to be the gain for that week. In making my calculation I totaled those items on the various cards marked "Gain" or "Loss"—"G" or "L".

Q. In other words, as I understand it, on the one you have a [567] "G" across from the "Bock", which indicates, and I am showing you here No. 9, and here is a "G-475", and here is a "L" and here is a "279", across from the letter "B", and then, "226-L" and then there is a "506" or "565" across from "L". That would be the loss, as you computed it? A. That's right. [567-A]

Q. Tell us what you did with the computation of all of those figures, in the card where it says "G" or "L".

A. They were totaled from the summary sheets that you have.

(Testimony of A. L. Bougher.)

Q. This is your summary sheet? I want to show it to counsel before you testify.

A. That's right.

Q. I will show you a piece of paper, which I offer next into evidence. Will you tell us what the net profit shows?

A. My totals of the net profit, as projected on these cards, for the year 1941, are \$14,029.

Q. \$14,029—wait a minute. 14,029, is that right?

A. That's right.

Q. And you got that by adding up all the gains or losses in that one column, that's the only thing?

A. That's right.

Q. And what was Government's for that year?

A. \$16,932.

Q. All right. Now how about 1942?

A. My total is \$26,412.

The Court: 1942?

Mr. Belli: I am sorry, 1941 was \$14,000. 1942 was what? A. My figure is \$26,412.

Q. And the Government's? A. \$34,001.

Q. All right. Now, 1943. [568]

A. \$26,918 is mine.

Q. Yours was \$26,918? A. Correct.

Q. And the Government's?

A. \$30,653.

Q. And no cents?

A. That's right. Do you want those differences?

Q. Yes. A. For 1941, \$2,903.

Q. How much was the total difference for all those years? A. \$14,227.

(Testimony of A. L. Bougher.)

The Court: How much for 1942?

A. \$7,589 for 1942, \$3,735 for 1943, making a total amount of \$14,227.

The Court: \$2,903 difference for 1941?

A. Correct.

Mr. Belli: Q. In your computation, before you show us any cards, did you note any cards, or have you any records there where you yourself found arithmetical errors through these cards?

A. I found so many of them that I did not count them all.

Q. What was the nature of the errors?

A. Additions, largely; errors of commission.

There were errors of omission in there on many of the cards. The expenses on the reverse side were not totalled. [569]

Q. Could you tell us what you mean by that?

A. Yes; on the reverse side of the card, the other side, which we were just studying, the expenses of the day are listed. They are not totaled there, but what purports to be the total is carried over to the face of the card as letter "E" up at the top. The third item down, the letter "E" purports to represent the expenses for that day.

Q. You say they were not accurate?

A. Yes, sir, I have checked it.

Q. Did you check other ones as to their accuracy? A. I did.

Q. How many of them did you find were not accurate?

A. To the best of my knowledge, one.

(Testimony of A. L. Bougher.)

Q. How many other ones—

A. I did not even make a comprehensive list of them.

Mr. Campbell: Did you say only one was in error? Will you read that answer, Mr. Reporter?

(Answer read.)

Mr. Belli: Q. To the best of your knowledge, one was inaccurate? A. Correct.

Q. On how many others did you find items of inaccuracy? A. Well—

Q. Could you dig some of them out during the noon recess?

A. I could very easily. Card No. 13 of 1941.

Q. All right, let's take that one.

A. These are the 1942 cards I have here.

Q. Card No. 13 of 1941, what about it?

A. If I could see the cards, I could dig that out for you.

Mr. Belli (Indicating): So the ladies and gentlemen of the jury will know, we are now going away from this card that we have been looking at up here, and going into other cards.

A. Cards of similar types.

Q. Card No. 13 of 1941, what about it?

A. The expenses listed on the reverse of that card are not totaled herein, but they do add to \$42.15.

The amount carried forward and reflected in that day's operations is \$59.15.

Q. And the difference there? A. \$17.00.

Q. Go ahead. By the way, whose handwriting is that in?

(Testimony of A. L. Bougher.)

A. Well, the expenses, to the best of my knowledge—I would not care to be—

Q. It is at the bottom or the top of the card?

A. It is at the top of the card.

Q. All right, go ahead.

The Court: Is that card No. 13?

The Witness: Yes, your Honor.

Mr. Belli: Go ahead. Could you ferret those out during the noon hour? [571]

A. There are not enough of them.

Mr. Belli: It is about time for the recess, your Honor. He might be able to do that. Then you have a net worth system here that you computed for Julius' audit, haven't you? You have computed the net worth here, haven't you? A. I have.

Q. Does that show an overpayment or an underpayment?

Mr. Campbell: That is objected to, if the Court please, no proper foundation laid.

Mr. Belli: We will show the payments and the rest of it then, after the recess, your Honor.

The Court: Very well.

Mr. Belli: Does your Honor see what he speaks of?

The Court: Yes.

The Witness: On Card No. 14—

Mr. Belli: Wait a minute.

The Court: We will take the recess, ladies and gentlemen of the jury. The same admonition. Appear at 2:00 o'clock, please. Do not communicate with anyone or suffer or permit anyone to converse

(Testimony of A. L. Bougher.)

with you on the subject of this trial until this case is finally submitted to you for consideration.

(Thereupon an adjournment was taken until 2:00 o'clock p.m. of the same day.) [572]

Afternoon Session, August 18, 1948, 2:00 p.m.

Mr. Belli: We will resume then with Mr. Bougher, your Honor?

The Court: Yes, the jurors are present. You may proceed.

A. L. BOUGHER,

recalled; previously sworn.

Direct Examination—(Resumed)

Mr. Belli: Q. Mr. Bougher, could you prepare me an audit from those cards?

A. Did you say could I?

Q. Or did you, or could you?

A. I did not and I wouldn't attempt to.

Q. Why is that?

A. Because I find them so utterly lacking in completeness and I would place so little reliability on the results that they purport to show.

Mr. Campbell: I ask that the last be stricken as not responsive to the question and a characterization and opinion.

The Court: Motion denied. This man assumes to qualify as an expert, I suppose, does he not?

Mr. Belli: Yes.

Mr. Campbell: Very well.

Mr. Belli: Q. I will tell you what let's do: Let's take [573] the card, the Government's own

(Testimony of A. L. Bougher.)

exhibit for which they had twelve prepared, and I want you to show me if you can find me an errors of mathematical computation on this exhibit of the Government. And, again, I would like to pass these out to the jurors. Just take your time when you go through them, so we can see exactly what we are talking about.

The Court: This is card No. 12?

The Witness: Card No. 1 of 1941.

Mr. Belli: Card 1 of 1941.

The Witness: Yes.

The Court: The photostatic copy of which I have, sir.

Mr. Belli: Q. Now, do you find an error of \$25 on that card?

A. There would appear to be one.

Q. Let's see what you find on it, then.

A. On the reverse side, on the front right hand corner we have a figure of \$226.20, from which is subtracted \$50, leaving \$176.20. Now, that \$50, one would from the card assume to be a payment made to Julius Wild.

Q. Why do you assume that?

A. It is intimated in one case on that same side of the card at the bottom.

Q. Down where it says \$50?

A. Yes, marked "Dr." over on the face of the card.

Q. On the other side of the face? [574]

A. Yes, where it says Debit and Credit, "Dr." and "Cr." there is \$120 plus \$50, which is extended

(Testimony of A. L. Bougher.)

as \$170, and which I am given to understand, or my understanding is that that represents the drawings of Julius for that week.

Q. Now, that is under what line—wait just a minute, now, so we will be clear. Below the double line it is the fourth line?

A. Yes, the fourth line.

Q. The “T” the “E” and the “B”, and under that there is “Dr.” and “Cr.”

A. Yes.

Q. All right, 170 there.

A. Yes.

Q. All right.

A. Back on the reverse side we are down to a figure of \$176.20, to which is added a figure of 43, making 219.20.

Q. Where did that 43 come from?

A. That 43 would appear to be and obviously is, the total gain of the day as shown on the face of the card.

Q. On the other side of the card between the two double lines where it says, “Total Gain” and it says “\$43”?

A. Yes, where the total paid out is deducted from the total take.

Q. Now, take that 43 and turn over the card and you have 43 under 176.20?

A. That is obviously a computation of the cash handled by [575] some one individual in that room for that day as a further summarization on the face of the card again in the center of the card, it distinctly says, “N 219.20.”

Q. That is under the word “Total gain”?

(Testimony of A. L. Bougher.)

A. Yes, meaning at the end of the day they had \$219.20, which agrees with the figure.

Q. \$219.20 on the back of the card?

A. Which we have arrived at.

Q. Yes.

A. Again on the face of the card immediately under "N" it says, "Start". Presumably it means the cash on hand at the beginning of the day, which is 201.20.

Q. Yes.

A. Well, if on the face of the cards it says there is \$201.20—

Mr. Campbell: Just a minute, I don't see that, if the Court please.

Mr. Belli: We want to be sure we are right.

The Witness: On the face of the card it says "Start".

Q. Let me see. Hold that up. You are looking at the face of the card, that is, there are double lines on the face and you said \$219.20. Now, where did it say "Start" you referred to?

A. Immediately below that?

Q. Right here? A. Yes. [576]

Q. It was \$219.20 here? A. Yes.

Q. Now, go ahead there.

A. It says quite plainly, "Start 201.20."

Q. Yes.

A. Over on the other side where the cash computation is that we have just gone through, when you start with \$226.20.

Q. Show us that.

(Testimony of A. L. Bougher.)

A. Right at the top of the upper right-hand corner on the reverse.

Q. On the upper right-hand corner on the reverse is \$226.20? A. Yes.

Mr. Belli: Does your Honor see that on the other side?

The Witness: Somewhere there is a \$25 discrepancy.

Mr. Belli: All right, that is the first card.

The Witness: Are you through with that?

Q. Are you through with it? Have you some more on there?

A. If you want a further incongruity.

Q. Yes, just tell us what it is.

A. Julius Wild is presumed to have drawn \$10 a day—

Mr. Campbell: Just a minute, I object to that characterization of the evidence. That is not the evidence here.

Mr. Belli: It shows on there.

Mr. Campbell: I concede he can testify from the face of the record, but there hasn't been any foundation laid for any presumptions on the part of this witness. [577]

The Court: He has been in court during the whole proceeding.

Mr. Belli: Yes, you are referring to the one which is supposed to have taken in \$10 a day as shown on the card?

A. To obviate the necessity of coming back to

(Testimony of A. L. Bougher.)

these cards again and again, we come point by point. [577-A]

Q. Without using the word "presumption" or "inference" let us assume there is a \$10 salary taken there. Can you state from that what is another incongruity on there, as you recall it?

A. On the face of the card, on the fifth line it says "Sal.," Then appear the figures \$55 plus \$30 extending it as \$85. \$85, according to the reasoning I aver from the testimony thus far—

Mr. Campbell: Now, just a minute, I am going to object to his conclusions from the evidence.

The Court: Sustained.

Mr. Belli: Q. Just state what you found.

A. My computation is that that 85 represents the total salary for the week ending.

Q. You can assume thus far; you can assume on the card that has been testified to that those legends are correct with reference to the \$85. Now, we will carry on from there.

A. I can go no further with it under the circumstances.

Q. Can you show us how many men were employed or what that would amount to, assuming the number of men employed were receiving the amount that was testified to as having been received?

Mr. Campbell: I object to that. That is invading the province of the jury, and consequently—

The Court: Objection overruled. [578]

Mr. Belli: Q. Go ahead.

(Testimony of A. L. Bougher.)

The Witness: A. At the very start of the card appears the item "Paid Out" \$52 for salary on that one day, Saturday. Salaries are paid daily. \$52 paid for the one day of Saturday does not reconcile with \$85 paid for the week.

Mr. Campbell: May I ask a question of the counsel, please?

Mr. Belli: Yes, any time.

The Court: Yes.

Mr. Campbell: Q. You say salaries were paid daily. You have no knowledge of this matter, have you?

A. Only from the testimony I have heard.

Q. You have heard testimony in this court that salaries were paid daily? A. Yes.

Q. And if so, by what witness?

A. I think that Mr. Hughes brought it up, and perhaps Mr. Krakauer. I wouldn't positively say.

Q. Would you say positively that either of those men so testified? A. No.

Q. So when you say that they were paid daily are you referring to any matter in the Court or information which came to you from any other source?

A. I can't be prepared to say which. My memory is not that good as to the testimony. [579]

Mr. Campbell: Very well.

Mr. Belli: I think the testimony was that they were paid daily.

Mr. Campbell: I have no recollection of that.

Mr. Belli: That is my understanding of it from the cards.

(Testimony of A. L. Bougher.)

Q. Is there anything else on that card, Mr. Bougher, besides those two items?

A. Not at the moment.

Q. What? A. No.

Q. You said "not at the moment".

A. That's right.

Q. Well, let's take the last card, Mr. Krakauer's last card, rather, of 1943. The last card in the bunch shows us what, can you show us if there are any incongruities? Show us what you find on the last card. That would be on a Saturday of 1943.

A. The card is dated 9-25.

Q. All right, go ahead.

A. The first place, the expenses listed on the reverse side of the card total \$175. The total is not shown on this card.

Q. Well, can you find out what the total is?

A. The total amounts to \$175.

Q. How about the front. Does it conform with the total on [580] the front of the card?

A. The expenses shown for that day on the card is \$235.

Q. There is a difference then of—

A. \$60.

Q. Yes, \$60. There are some other cards that have the same situation pertaining to them, aren't there?

A. There are one or two other items on this one.

Q. All right, just go ahead and tell us what else there is on that one card.

A. There is a \$10 arithmetic error. In the first place, on the top line the total take for the day

(Testimony of A. L. Bougher.)

was listed as \$4582 and was subsequently changed to \$4572.

Q. Yes.

A. Resulting in a subtraction of the total paid-outs from the total take being \$10 out.

Mr. Campbell: May I ask another question if the counsel and the court please?

Mr. Belli: I don't know about these questions.

Mr. Campbell: He has stated a conclusion of something being subsequently changed and I want to know if there is anything on the face of the card which indicates that.

The Witness: There **is**.

Mr. Campbell: May I ask a question?

The Court: Yes.

The Witness: Surely. [581]

Mr. Campbell: You say the card says \$4582 and was subsequently changed to \$4572? A. Yes.

Q. Were you present when the change was made? A. No, but it is obvious.

Q. On the face of the card?

A. On the face of the card.

Mr. Campbell: May I see that?

Mr. Belli: Will you show it to the jury, Mr. Campbell?

Mr. Campbell: The 8 and the 7 both appear?

A. Correct.

Q. Both in ink? A. Yes.

Q. Are you able to examine the ink and determine which was written first? A. I am not.

Q. Though it is your conclusion that one was written after the other?

(Testimony of A. L. Bougher.)

A. My conclusion is justified by the fact that the subtraction made and the result left there was made, from the 4582—5205 was deducted, leaving the amount of 377.

Q. Will you point that out to the ladies and gentlemen of the jury?

A. It results in the \$10 error in the statement of the profits of the day. [582]

Mr. Belli: This is on the same card that there is a difference. We will pass this after you have looked at it.

Q. That is the one where there is the \$60 error in the difference between the expenses on the front and the back? A. Yes, there is also an item—

Q. All right, what is the third item on that card?

A. Down at the bottom on the third line of the weekly summary we show an item of \$16,111, which according to my understanding of the system represents the total brought forward from the Friday card. To that is added \$4582, being the total take for the day which we have already dealt with. Now, if those two are added together, we find that the total should be \$20,693. The total actually extended as the weekly total is \$20,918.

Q. The first was \$20,693?

A. That's right.

Q. And what was the other figure?

A. \$20,918. Now, that is further—

Q. That is \$225 difference?

A. Yes, and that \$10 discrepancy is still embodied in that total.

(Testimony of A. L. Bougher.)

Q. Is there anything else on that card?

A. No.

Q. Anything on that particular card before going to any others? [583]

A. Nothing else.

Mr. Belli: I would like, while the witness is looking at that one, to have this one shown to the ladies and gentlemen of the jury.

Q. This one here where the 8 and the 7 were changed and expenses on the back don't come through to the front of the card or are contained on the card passed to the jury, and that is the one of 9-25, do you know who wrote in pencil over the lid on the front of the card on the top of it?

A. No, I don't it has been changed. [584]

Q. And by the way, all of these cards, at the top, have a red—the same red pencil, apparently, right?

A. That's right.

Q. O.K.—for the three years? A. Yes.

Q. All right. In order to explain your answer further, as to why you could not give me an audit from these cards, will you show what other errors you perceive in the cards?

A. May I see my records over there?

Q. Which do you want?

(Witness secures record and returns to the stand.)

A. I would like to refer to card No. 12, 1941.

Q. Have you got it there? A. Yes.

Q. Go ahead.

A. On card No. 12 of 1941, the total take for the day of \$1,011.50 is deducted from the total of

(Testimony of A. L. Bougher.)

the paid out, to reflect a net loss for the day of \$100.

On line 3 of the weekly summary, at the bottom, we have a figure, under B for "Book" of profit brought forward from the Friday night card.

To this figure of \$408 we add \$100, thus extending that item of \$508 for the weekly total, which is not marked as either a gain or a loss.

In other words, we don't know whether it is a loss of \$408 [585] brought forward or a profit.

Q. All right. Any others?

A. This card, I might say, is one which I picked out at the noon recess.

Q. All right. Any others?

A. As I find, on consulting my summary, that \$508 is not listed here. I have indicated it in my figures as a loss. If the \$100 for the day is added to the \$408, that \$508 should be added as a loss and not a profit.

Q. How do you have it?

A. I have it in my summary as a profit, because I took this off of the photostats.

Q. Show me some of these other cards with these errors in them. You are referring to a B, which is identified. Now the figure B is here, then an E. The B is supposed to be a book, or whatever that is, and we have then a gain or a loss, G or L, in front of the \$508, and you say there is none there.

I would like to pass that to the jury, if I may.

Mr. Campbell: May I see that card?

Mr. Campbell: There appears a pencil mark of a minus sign in front of the \$100 at first.

(Testimony of A. L. Bougher.)

(Card examined by Mr. Campbell.)

Mr. Belli: We will pass this to the jury. There is a G or L there across from the B. Do you refer to this pencil in front of the figure there? [586]

Mr. Campbell: I don't know what it is. It is a minus mark in front of the \$100 and a plus in ink—the minus in pencil.

Mr. Belli: What page have you there, Mr. Reporter? The Reporter: 166.

Mr. Belli: Q. All right, give us some other ones that are errors there, Mr. Bougher. On your note you have that last card referred to as what, So I can dig it out again?

A. This last one that we are wroking on?

Q. Yes. A. Card no. 12 of 1941.

Q. That is not the only one where there was no gain or loss marked on it, is it?

A. No, there are many of them.

Q. All right, let's dig them out, and let's show the ladies and gentlemen of the jury. Also see if there is a pencil minus in front of them.

A. Here is another one.

Q. That is what? A. No. 5, 1941.

Q. No. 5 of 1941. Across from the B there is nothing, and \$606, and nothing as to whether it is gain or loss. Have you got that one, Mr. Campbell? No pencil on this.

Mr. Campbell: The card shows total gains for the day of \$163, and receipts, \$443, plus 163. [587]

Mr. Belli: In red pencil it shows those figures, that it was a gain.

(Testimony of A. L. Bougher.)

Mr. Campbell: Just a minute. Ask the witness. It does not show that in red figures, the total gain for the day, that's what it shows.

Mr. Belli: Q. You tell us everything that it shows, Mr. Bougher.

A. The total gains for the day shows as \$163.

Q. What are the red figures on there?

A. The red figures would appear to be "Start \$260, End \$226," and then \$34 brought down with a further notation in red "cks 640, a debit," whatever that may mean.

Q. All right. How about across from the word B there? Is there anything in there on that?

A. There is not, there is nothing to indicate whether the total forward is—

Q. The red on this card is in the same color, is it not, as it is at the top of the cards there?

A. It is.

Mr. Belli: All right, may we pass this to the jury, and call attention to—across from the B.

The Witness: Card No. 8 is the same.

Mr. Belli: Q. Card No. 8 is similar?

A. Yes.

Mr. Campbell: Similar to what? [588]

A. There is no gain or loss marked on the weekly summary.

Mr. Campbell: May I ask a further question on voir dire?

The Court: Yes.

Mr. Campbell: Q. You say there is no gain or loss, Mr. Bougher?

A. Pardon me, that is No. 10. Where is No. 8?

(Testimony of A. L. Bougher.)

Q. Take any card. When you say there is no gain or loss you are indicating, as I take it, that the word B does not say either gain or loss, is not that right? A. That's right.

Q. It is all a black figure there, isn't it?

A. It is.

Mr. Belli: What is all a black figure? Across from the B?

Mr. Campbell: Yes.

The Witness: Yes, in the majority of instances there is either a G or an L.

Mr. Campbell: Q. Is there any place where, across from the B, there is purportedly a loss that is marked in red?

A. No—well, now, I should not say that. It is largely in black, all of them. Some are marked L and some G.

Mr. Campbell: I suggest, if the Court please, that the witness is not competent to characterize the cards. He can state what the cards contain or what they do not contain.

The Court: I thought we had a definition of the various [589] legends?

Mr. Campbell: We have, your Honor.

Mr. Belli: We had—there is another one here—

Mr. Campbell: That man was on the stand and described what they were. This man is giving his own impressions, his own conclusions.

The Witness: I was asked if I could—

Mr. Belli: You stay out of it.

Your Honor, here is what I have in mind: Here

(Testimony of A. L. Bougher.)

I just at random pick up a card, and here is "B 736 plus 151."

The Court: B would mean book?

Mr. Belli: Book, yes, and then there is an L over there, which I take to be a loss, and that is all in black ink, "\$847." Here there is, just before that, "B 2388, 988," and there is no gain or loss on that. That is in black ink.

But the one before that, that has a "G" and it is in black ink. That is what he is trying to show here.

Mr. Campbell: I have no objection to him pointing out what cards there are with no G or L on, but for him to make a statement that it is a gain or loss for that day is his conclusion.

Mr. Belli: I thought that was understood by the legends offered from the witness for the Government.

The Court: Is the Government witness here who brought up the schedule? Is he in court? [590]

Mr. Campbell: Yes, your Honor.

The Court: He is in court during this testimony, may the record show, and he is in such a position as he is able to hear this witness testify. Does he have his original work sheet with him?

Mr. Campbell: No, sir, he does not.

Mr. Belli: I would like to call this one to his attention, that I dug up at random. If you have some more there—just thumb through them like that? A. You mean those gains and losses?

Q. Yes, where it is not indicated whether there was a loss or a gain.

(Testimony of A. L. Bougher.)

A. Here is No. 8, No. 27—

Q. All right, go ahead. A. No. 29.

Q. Go ahead. A. No. 31.

Q. Go ahead. A. No. 34.

Q. If you come across one in red ink, let me know. A. No. 37, No. 40, No. 47, No. 48.

Mr. Belli: We will put this up here for the time being. Can you look through the other stuff there, on this, which ones don't show the G or L.

We might save, Mr. Campbell, more time if—

Mr. Campbell: I will stipulate that a number of cards are there that do not have the letters G or L after the word B, for the final figure.

Mr. Belli: Can you tell us whether, in your computation, when they did not show whether they were gain or loss, how they were computed, as gain or loss?

Mr. Campbell: I can not tell you on either one. I will compare government's computation with this man's computation on cross examination.

Mr. Belli: Well, could you answer my question as to the computation when it did not show whether they were a gain or a loss? How was it computed? Was it on his net income, that it showed a gain, or was it shown that there were losses?

Mr. Campbell: The testimony here from the government agent was that he found a number of adjustments that he had to make on account of the errors in additions or subtractions and in arriving at his computations, how he made those. He was not cross examined concerning it.

Mr. Belli: This is not a question of additions or

(Testimony of A. L. Bougher.)

subtractions. I am still trying to get your formula, to save time, just exactly what the government man did when he came across cards here which did not show whether they were a gain or loss. Was it charged against Julius or against Uncle Sam?

Mr. Campbell: In some instances it was one way and in some instances the other, depending on the explanations that we [592] obtained from Julius and his employees.

Mr. Belli: Have you got a formula as to what was charged to him, and what was charged against him?

Mr. Campbell: I will have to go through this with the man, where there were any discrepancies between his figures and our final figures—I think we will get it within a few hundred dollars.

Mr. Belli: Well how did he compute them? Could you compute them as gains or losses?

The Witness: Remember, all I have done is to read the total of those items as shown by the cards as the net gains for the week—gains or losses.

Mr. Campbell: Q. What did you do on these figures where you could not tell whether they were gains or losses?

A. I could only presume it to be one thing or the other. That is why I brought up that item, the item of \$508. The loss for the day is deducted from the previous total, or is added to the previous total, consequently that should be a loss, but there is nothing to indicate it, and stand out there as it did,

(Testimony of A. L. Bougher.)

I included it as a profit. I may have other items that are out of order.

Q. Show us some other cards that you have.

A. As far as the errors are concerned, I think I typified all of the various types. I did not attempt to list the difference there, arithmetical or otherwise. [593]

Q. Did you prepare a computation from the testimony that was adduced here in Court at the present time with reference to Mr. Wild's net worth at the beginning of the period and net worth at the end of the period, to ascertain how much income he had during the period?

Mr. Campbell: He should answer that yes or no, if the Court please.

A. Well, I don't know what you have there. I can only say no.

Mr. Belli: I don't know what I have in front of me here, but let's see what it is. Did you compute a balance sheet to show the community property between the Wilds as the net worth—assets at the beginning of this period? A. I did.

Q. And the net worth established at the end of the period? A. I did.

Q. And then taking into computation the loans, living expenses at \$350 or \$400 a month, and the stock that was purchased at the beginning or during the period, and so forth? Did you then compute the income, what it would have been during that period, to have had the difference in the net worth?

(Testimony of A. L. Bougher.)

A. I did.

Q. Is that the one, in final form now?

A. That is the one.

Q. All right, can you tell us the computation that you made, [594] the way you arrived at the computation for his net worth at the beginning and end of the period, and tell us what his income would have had to have been, according to that computation, what the declared income was, and what the declared income should have been?

Mr. Campbell: That is objected to as no proper foundation laid, and invading the province of the jury as well, and it is also incompetent, and also argumentative, so far as what his income would have to have been.

The Court: The objection as to laying the foundation is good. He should avail himself of the dated records for that testimony.

Mr. Belli: You have a computation. Will you go through that computation, and tell us, as you go through those figures, the basis for those facts?

Mr. Campbell: I am going to object to that, if the Court please, because we have no method of testing the basis for it, after his stating the facts. I object to that, no proper foundation laid.

Mr. Belli: Suppose we do it this way. Without laying a foundation for the aggregates here, because they are separate items, suppose before you give **any** figure there, you refer to the first figure here as testimony from such and such a witness, introduced in such and such a manner, and if you are

(Testimony of A. L. Bougher.)

assuming that testimony to be correct, then put [595] that figure down, and build from that figure, rather than for me to give you a hypothetical question.

Did you prefer, I could give a hypothetical question, but it would take me about an hour to do it, and I thought it would be best this way. I think that we will find that they were all produced in court, all the testimony.

(Witness examines cards.)

The Court: Have you examined it, Mr. Campbell?

Mr. Campbell: No, I was going to make that request.

The Court: I suggest you examine it. We will take a short recess, ladies and gentlemen, while this matter is gone through, there might be an interchange between counsel for verification of this. We will take the afternoon recess.

(Recess.) [596]

Mr. Campbell: Now, if the Court please, I have examined this sheet produced by the witness and for the purpose of my objection I am going to ask it be marked for identification.

Mr. Belli: That is my only copy. I would like to have it back.

The Court: You may have it back, certainly.

Mr. Belli: But I want to be sure to get it again.

Mr. Campbell: I am having it marked so there is no question about what we are referring to.

The Court: It may be marked for identification, so the record may hereafter reflect the basis.

(Testimony of A. L. Bougher.)

(The document was marked Defendant's Exhibit N for Identification.)

Mr. Campbell: Now, I am going to object to the question asked the witness and the proposed testimony relative to his summation of the net worth statement upon several grounds. In the first place, the document which he has produced and which purports to be his summation contains certain matters which are contradictory to the evidence, either admitted or stipulated to, and contains other matters concerning which there has been no evidence whatsoever adduced in this trial. Secondly, the proposed testimony of this witness relative to the net worth computation is an attempt to characterize the testimony of the various witnesses who have been produced here on the stand to allow or disallow and is his opinion of the [597] testimony as such and is an invasion of the province of the jury, and is not a summary purportedly based on books and records which are before him, and which would be his sole function as an expert accountant.

There is no place in our jurisdiction for an expert other than the judge, himself, in analyzing the testimony of the witness and which shall or shall not be given consideration by the jury. I submit no proper foundation has been laid for this testimony, that the proposed testimony is demonstrated by the sheet here by the witness is not substantiated by the record, and some parts which I can point out, but will not take time to do so, are

(Testimony of A. L. Bougher.)

contrary to certain figures placed in the record and certain evidence here.

Mr. Belli: That is what I would like to know, in what parts it does not conform to the proof.

The Court: There is one item that is particularly significant and it was for that reason that I wanted counsel to have more time to look over the exhibit, and declared a recess. There was one item, the alleged \$1000 loan with respect to the witness Joseph Sammut, otherwise known as Artchoke Joe—

Mr. Belli: I think before the case is through we will have some evidence—

The Court: Pardon me one moment—Artichoke Joe, who denied categorically ever having seen the defendant.

Mr. Belli: I have that very well in mind. [598]

The Court: I have that in mind. There is one item on which there is a sharp conflict in the evidence and the matters of loans, and so forth and so on.

Do you have anything to say for the record about that statement?

Mr. Belli: If I could just have a moment with counsel, and I am about through with this witness—Mr. Campbell, will you look here and tell me what items—you don't have to call them out—or you can call them out—

The Court: There is one other observation I should make, as it is my duty under the law to make, this witness testified earlier in his testimony

(Testimony of A. L. Bougher.)

with respect to the 1941 business he had concluded a profit of \$14,029, is that correct?

The Witness: No, sir.

The Court: Q. What did you have? You read a narrative containing the figures, for 1941, \$14,-029; for 1942, \$26,412; and for 1943, \$22,918.

A. As being the totals of the cards?

The Court: Q. Yes, the cards.

A. But not conclusion as to profit.

The Court: Q. In other words, that was the totalization of the cards?

A. An arithmetic calculation of the addition shown on the cards.

Q. And you gave the totals of the government as compared—

A. As being the same amount. [599]

The Court: Yes, and this document which you have handed counsel presents a number of items which—

Mr. Belli: (Interrupting): Maybe we can solve it this way, if I can just know at this time the basis of the objection, and if counsel will show me what items he objects to, and I will withdraw them and expedite it this way.

Mr. Campbell: My fundamental objection is that it is an attempt to differentiate among the testimony of the various witnesses here. Counsel's theory can be produced to the jury in argument. The jury have in their minds, or will have refreshed in their minds the testimony of these various witnesses. For example, the witness has listed

(Testimony of A. L. Bougher.)

other accounts of \$290, and in the stipulation there is this that in the Civic Center Branch of the American Trust Company, which is apparently lumped together, he has listed three bank statements; cash and savings account \$1992.94. The stipulation here was, and it was verified by the witnesses that in the savings account No. 298 at Redwood City Branch of the Bank of America, \$1992.24, which I assume is the figure he is referring to; and there is another bank account, \$292. The stipulation is here after the records were received from the bank, that in the American Trust Company, Civic Center Branch, the final balance was \$2108, while the figure he has is \$298, some two thousand less.

The record will bear me out on the stipulation. I was [600] very careful. I had this document before me. The witness here lists the California Jockey Club stock at \$18,000. The evidence here shows it was purchased, one group for ten thousand and the other group for six hundred or six fifty, both according to the testimony of Mr. and Mrs. Wild.

I don't think we should take time to go through each one, but these are examples, and I think they demonstrate the fallacy of this method and the foundation of this witness to testify.

Mr. Belli: I see counsel has in his hand the same fallacy, because he has computed the net worth. Let me make the suggestion, counsel, that you give me a copy of the net worth and I will give you

(Testimony of A. L. Bougher.)

mine, and we can compare them by the testimony.

Mr. Campbell: I prefer to rest by the testimony. I was aware counsel was reading at the time I was addressing myself to the Court. This is a summary of the evidence and I was referring to it in my statement to the Court in comparing with this document which has been marked.

Mr. Belli: I think the jury is entitled to it, if I am not entitled to it.

Mr. Campbell: I stand on my objection.

Mr. Belli: Maybe I am not entitled to it, but certainly the jury is. If counsel claims these figures are incorrect that we have here as to \$298 in the bank, we stipulated to it, [601] and if I am in error I think the Government should be both charitable and gracious enough to give us the figures they intend to argue and say it is a summary for the benefit of the jury's perusal, if not for mine. My determination of it is of little moment here.

Mr. Campbell: On that matter I have—

Mr. Belli: All right, we will ferret it out, ourselves.

The Court: Counsel, I think you have accomplished your objective in attempting that offer.

Mr. Belli: I beg your pardon?

The Court: Counsel, I think you have accomplished your objective in attempting that offer. If there be any matters that are the subject of clarification between that sheet you have and this attempted rehabilitation of the figures—and what you have attempted there is to rehabilitate certain figures from an accountant's viewpoint.

(Testimony of A. L. Bougher.)

The Witness: From an accountant's viewpoint.

The Court: Q. Ordinarily you would take what figures were at hand? A. I would.

Q. Let us assume there had been a fire in the shop of the defendant Julius Wild and the books were totally destroyed, and you went down there and had the duty cast upon you, either for the Government or for the defendant, to rehabilitate figures. You would then start in that fashion? [602]

A. That's correct.

Q. In other words, you would reconstruct from a mode of living a certain income basis or rationale, and then you would proceed and set up your various predicates and then you would draw certain conclusions. A. Yes. [602-A]

Q. But in this case there are certain records available? A. Yes.

Q. And included among those certain records available are all these little sheets, these little cards.

A. They haven't all been available.

The Court: Q. Well, they have been in Court, the Krakauer cards.

A. Yes, they were available, but they have no bearing whatever on that statement.

The Court: Q. They have been available with respect to the income tax feature, isn't that correct?

A. That is true.

Q. Now, the various errors that you have pointed to in those little cards, have you made a summation of those to the end that you would take the

(Testimony of A. L. Bougher.)

debits and credits as reflected by error and reduce or increase the amount of tax due and owing?

A. No—

Q. In other words, the various errors you have pointed out before the Court, \$10 here, \$20 here and \$40 there, in the final analysis are the subject of compilation, are they not?

A. No, not so far as any statements that I might prepare are concerned. The errors that I have found, the sketchiness of the entire setup are such that I would place absolutely no dependence on those records.

Q. You heard the testimony of Mr. Wild when he said the [603] records were quite accurate from his viewpoint; and he said Krakauer was within one-half cent accurate, didn't he?

A. That may be.

Q. You heard that testimony, did you not?

A. Whether or not in those exact words, I heard something to that effect from Mr. Wild.

Q. I am not altogether clear in my mind as to the basis of the figures you gave, Mr. Witness, concerning the item of \$14,029, \$26,412 and \$26,918. How did you get those figures? What was the basis for them?

A. From the cards.

Q. Yes.

A. On the cards, on each set of cards there is an item marked "B", which I am given to understand represents the net profit for the week. I totaled those as shown by the photostatic copies of the cards which I prepared my summary from and

(Testimony of A. L. Bougher.)

secured those figures in so far as my summary was able to. Those figures were at variance with the amount of net profit shown by the Government. My purpose being to determine the differences between the net profit figures shown by the Government and the totals of the "B" item on those cards. There are discrepancies there due to the adding back of this so-called protection money and all the salary which Julius was presumed to have drawn. Those are the discrepancies and largely account for those differences. [604]

The Court: Q. Those two items?

A. Yes.

Q. Just the two items? A. Yes.

Q. On the salary item of \$10 a day, did you take the position that is or is not income?

A. I don't take any position on that, and I don't take any position on the \$14,000. I was merely trying, in the first place, we were refused access to certain facts and figures.

Mr. Belli: Q. What do you mean by that?

The Court: Q. These records have been available in Court.

A. Since we have been here, yes, but I haven't been able to sit down and make a comprehensive summary.

Q. Are there any records you desire from the Government that would aid you?

A. That would have saved a lot of time and trouble on both of our parts and saved a lot of confusion had we had the opportunity to compare

(Testimony of A. L. Bougher.)

our summary sheets prior to coming in to Court, which Mr. Campbell says he can do **now**.

The Court: Q. Where is your summary sheet you have in mind now?

Mr. Campbell: May I ask a question on voir dire?

The Court: Yes.

Mr. Campbell: Q. Mr. Bougher, do you remember whether or [605] not a number of months ago you first came into the case you came to my office, do you recall, at 100 McAllister Street Building?

A. Yes.

Q. At that time you were shown these cards, No. 7, 8 and 9, were you not?

A. That's right.

Q. And you made an examination at that time, didn't you? A. Of the photostatic copies.

Q. And we provided at the expense of the Government, you with a photostatic copy of each of these cards, didn't we? A. No.

Q. Were you not provided with a photostat?

A. No, I was merely allowed to examine a photostat.

Q. Weren't you allowed to take away at that time a photostat? A. No, sir.

Q. You did, however, examine a photostat of those cards? A. Yes.

Q. And each and every one of those cards?

A. That's right.

Q. And were at any time you refused access to

(Testimony of A. L. Bougher.)

any of Mr. Wild's records which were in possession of the Government of which you know?

A. No, I didn't know what you had and what you didn't have.

Q. Did you ever, at any time, produce and show to the Government [606] or bring to the Government the compilations or summaries which you made?

A. I had them right there in the office when I was there working. I completed them there.

Q. Did you show those to any government employees?

A. No, there was no opportunity.

Q. Did you ask to have any comparison made of your summary with any summary the Government made?

A. We were discussing—

Q. Pardon me, I realize I am not entitled to ask for the conversation, but did you ask for that opportunity—

Mr. Belli: You can ask him for the conversation.

The Witness: How is that?

Mr. Campbell: Q. But you were shown every record, were you not?

A. I was shown those photostatic copies of those cards.

Q. And you were shown the cards themselves?

A. That's right, yes.

Q. So you had an opportunity to compare the original cards with the photostats, is that right?

A. Not completely, no.

Q. Well, you made whatever comparison you

(Testimony of A. L. Bougher.)

wanted, didn't you? Were you ever refused access to them? A. To the cards, no.

Q. And so far as you know, was there anything that you didn't [607] see that the Government had that belonged to Wild?

A. Not that belonged to Wild, no—nothing I know of.

Q. The complaint you have is that the Government accountant didn't show you his work papers?

A. It is not a complaint.

Q. So when you made the statement that you were not given access to all of the records that were available you are not referring to the fact that you were not given everything the Government had that pertained to Wild's records?

A. When you say "pertaining to Wild's records"—

Mr. Campbell: Well, strike the word "pertaining"—as far as Wild's records.

A. As far as Wild's records, I was given access to everything that so far I know you have.

Mr. Campbell: That's all.

The Witness: His method of dealing with them.

The Court: The objection interposed for the record to the so-called summary now marked Defendant's Exhibit N for identification is sustained.

Mr. Belli: It is sustained on the ground it is assuming facts not in evidence?

The Court: It is sustained upon that ground and several other grounds more particularly set forth by counsel; the inaccuracies apparent therein,

(Testimony of A. L. Bougher.)

assumption of fact, delineation of fact that has been in sharp conflict; and further upon the [608] particular ground and more pronounced ground, it is an attempt to rehabilitate figures wherein they are drawn from records either not available or non-existent. The records are before the Court with respect to the three years in question, 1941, '42 and '43. Subject to those minor inaccuracies or inaccuracies in fact that have been pointed out by the witness, those records are here for any audit that may be accomplished thereon. I see no occasion to assume that in this case there are no records upon which net worth may be predicated.

If you have a statement, Mr. Campbell, of net worth hand it to counsel and let us see if there can be some clarification over night.

Mr. Belli: Let us approach it from that view, then.

The Court: There is nothing counsel for the Government has that the defendant can not have, or vice versa.

Mr. Campbell: I will hand counsel a copy of this document, Julius and Emma Wild Computation of Net Income on Net Worth Basis showing January 1, 1941, and December 31, 1943.

Mr. Belli: I will have to make a copy of my own so I can give the Government a copy.

Mr. Campbell: It is not essential we have a copy.

The Court: After the recess today and before Court tomorrow morning, you can go over the matter with the Government.

(Testimony of A. L. Bougher.)

Mr. Belli: You may cross examine, Mr. Campbell. [609]

Cross Examination

Mr. Campbell: Q. Mr. Bougher, I believe you stated you are a public accountant?

A. That's right.

Q. Presently employed by Mr. Belli, the defense counsel here in his office, or you office with him, is that correct?

A. No, I practice myself.

Q. But you occupy the same suite of offices?

A. An office, in his suite.

Q. Did you have anything to do with the conduct of Julius Wild's business in 1941, 1942 and '43?

A. I did not.

Q. Or with the keeping of any records or reports in connection with the business?

A. No.

Q. I take it that the testimony which you have given here relative to these cards is based upon what you have observed upon the face of the cards, is that correct?

A. Yes.

Q. Now, you have given a total for the year 1941 of \$14,029 as representing the profit as set forth in Government Exhibit 7 on the face of the cards, is that right?

A. Yes.

Q. That is a total of the figures after "B", is that correct?

A. That is correct. [610]

Q. You pointed out that there is a difference, that the Government figure was around 16,932.

(Testimony of A. L. Bougher.)

Now, the difference between your figure and the Government's figure is the amount of withdrawals by way of salary by Julius Wild, is it not?

A. I believe so, yes.

Q. Is that right, sir?

A. I believe so, yes.

Q. And the Government in Exhibit 13 comes up with a final net profit figure from the horse business of \$17,982? A. That's correct.

Q. The difference between the figure you gave of \$14,000 and the Government's figure as represented by the salary drawn by Mr. Wild is the difference between the disallowance of the protection payments, is that right? A. Yes.

Q. So that so far as all of these adjustments that you have referred to, and incidentally, you heard the Government agent state he had found certain errors in addition and subtraction and he had made adjustments, is that right?

A. I did.

Q. So that without going into each specific adjustment that you may have had in arriving at your figure, your figure as found from these cards and the figure of the Government agent are substantially the same, is that right?

A. They are. My intention was merely to reconcile them. [611]

Q. I understand the intention, sir, but when you add the figures on these cards of profit and add to that Julius' salary plus the protection payments, the latter two items, that is, Julius' salary

(Testimony of A. L. Bougher.)

and the protection items have been taken as expenses, but when they are added to the profit as shown on these cards your figure is substantially that of the Government agent, or \$17,982 for 1942, is that correct? A. That's correct.

Q. And the same is true as to 1942 with reference to your assumption on these cards, isn't it, that if you take the profit shown on these cards together with the salary drawn in that year by Mr. Wild, and deduct it daily as expenses, and the 105 a month for the twelve months of protection payments, your figure would be substantially the same as the Government agent, \$35,261, isn't that right, sir?

A. I did not have the opportunity of checking 1942 and 1943 in that regard, but I believe that to be the case. The entire total would be substantially the same given those two reconciling items. Those were the points that I wanted cleared up in my mind.

Q. Now, the jury is not interested in your state of mind, but is interested in what is on these cards.

A. Yes.

Q. And is it correct, or, first, let me ask you: You say you did not make a computation on 1942 and 1943 with reference to [612] the drawings of salaries. A. That's right, sir.

Q. Would you say, Mr. Bougher, from such examination of the cards as you made that the total amount drawn by Julius Wild as salary or drawings in the year 1942 and deducted as ex-

(Testimony of A. L. Bougher.)

penses therefor not reflected in the profit figure was \$5140? A. No, I wouldn't.

Q. You didn't find fault with that figure?

A. I did find fault, yes. I thought you asked me if I wouldn't say that was it.

Q. Have you added up the cards?

A. All of the cards?

Q. Have you added up all of the cards, the drawings as shown by Julius, here? A. No.

Q. So you don't know whether or not that is correct? A. That's right, I don't know.

Q. You don't know? A. No.

Q. Now, do you know whether or not the figure computed from these cards as being Julius' drawings and deducted as expenses before profit is figured on these cards during the ten months of 1943 that are represented by the cards, is the sum of \$4865? Do you know? [613]

A. I don't know.

Q. You made no computation of those figures, is that right?

A. I didn't consider there was ground for it. I didn't consider there was record available to produce it.

Q. Whatever you considered you did not compute the amount that is shown on the face of these cards as drawings by Julius?

A. I considered it impossible to determine with any degree of accuracy.

Q. You didn't add those figures?

A. I didn't.

(Testimony of A. L. Bougher.)

Q. So you don't know what these cards show in that respect, is that right, sir?

A. No, I don't.

Q. You don't know what the total is as shown by these cards?

A. I don't, but I do think it is indeterminable.

Q. So far as you are concerned of the net profit shown by these cards, aside from the matter of salary, which you did not compute for 1942 and 1943, your figures are not substantially different than the revenue agent's, isn't that right, sir?

A. That's correct.

Q. Now, a number of these so-called errors you pointed out on these cards were as a matter of fact in Wild's favor, weren't they?

A. It depends on what one. [614]

Q. Well, the first card you called attention to is card 13, and I am just calling your attention to one. We won't go beyond that on Exhibit 7, and you called attention to the fact that there was an error here. Do you recall that card, an error of \$10, I believe it was? [614-A]

A. No, this is an error of \$1106, against him—\$1116.

Mr. Belli: I didn't understand what you said.

A. It was an error of \$116 against Julius. He asked if it was in his favor.

Mr. Campbell: Q. You are referring to the figure "take" here, where there is this computation?

A. No, I am referring to this figure of profit and loss \$508 shown there as a profit, or I assume

(Testimony of A. L. Bougher.)

it is taken as a profit. He might take it as a profit, but on closer examination I found a \$100 loss has been added to profits, totaling \$408.

Q. Well, do you know whether that \$408 represented a profit or loss up to that point?

A. I did not know that, and I place little credence in any of those "forward" figures.

Q. That was an assumption on your part as to what the \$408 represented, is that correct?

A. The entire system is an assumption.

Q. Referring to Card No. 13, which you first pointed out as being an error, do you recall that card?

A. I do.

Q. That card had the effect of showing a smaller figure for the profit than there was actually earned, isn't that right?

A. By \$17, but not necessarily in favor of Mr. Wild.

Q. But it shows—and the only figure of the card, is accepted [615] as \$17 as a profit actually earned that day, doesn't it?

A. No, it shows that there was a \$17 difference in the cash somewhere, an unexplained difference of \$17 against Mr. Wild, or he should have had \$17 more on it, presumably, for computing his tax.

Q. I call your attention to the fact that the day's profit is added at \$35, but it was taken as a loss. The loss for the week is \$51, but actually, as

(Testimony of A. L. Bougher.)

I understand your testimony, the expenses are overstated by \$17, is that right?

A. That's right. It is overstated on the front, which means that \$17 is gone somewhere.

Q. When you say there is a shortage in the cash, that, too, is your assumption, isn't it?

A. No more than the rest of it. As I say, the entire system is a series of assumptions. It must necessarily be.

Q. That, of course, is your conclusion as well?

A. That is my professional conclusion.

Q. How long have you been an accountant, Mr. Bougher?

A. For approximately 28 years.

Q. And you have practiced here as a public accountant in this city for that length of time?

A. Not for that length of time, no.

Q. For how long have you practiced?

A. In the State of California I have practiced for myself roughly about one year. I have only recently embarked on my own practice, for this last time.

Q. Have you had any previous experience with reference to the records of horse betting rooms?

A. Not horse betting rooms, no.

Q. Or of this kind of business?

A. In one slight respect, yes.

Q. In what respect is that?

A. I had a client who was engaged in the same operation.

Q. You kept his records for him, did you?

A. No, he kept his own records.

Q. You audited those records?

(Testimony of A. L. Bougher.)

A. I did not audit them, I summarized them and advised him on them, in a friendly way.

Q. Not in a professional way?

A. Not professionally, no. I accepted no fees.

Mr. Campbell: All right, that's all.

Mr. Belli: That's all, Mr. Boucher.

PROCEEDINGS IN REFERENCE TO MAXFERD ACCOUNT

Mr. Belli: There is one other item I spoke to counsel about the other day, and that is with reference to the Maxferd account.

I notice we got the computation there. There is an account owing of \$1132 at the beginning of 1941. The records do not show that, and if we call the Maxferd man he will testify that he misunderstood Mr. Campbell and there was nothing [617] owing at that time. I say that in the presence of the jury, because that is the fact. Could you check on that?

Mr. Campbell: I think the record is right here. That can be checked between now and tomorrow morning. It is not, as I recall, verified in the testimony.

Mr. Belli: That is correct. He testified that way, and we thought that was in error, and phoned him, but we can check that.

Mr. Campbell: That was his testimony, as I recall, that that was the amount.

Mr. Belli: That is the defense, with the exception, your Honor, of Mr. Krakauer, himself. As I understand it, the prosecution is going to call Mr.

Krakauer, so we won't call him presently, he being their witness.

Mr. Campbell: I did not get the full statement.

Mr. Belli: If you are going to call Mr. Krakauer, we won't call him again—for several items—but if you don't intend to call him, then we will be forced to call him.

Mr. Campbell: I suggest counsel put his case on in the proper manner.

Mr. Belli: Call Mr. Krakauer. [618]

JULIUS KRAKAUER,

recalled; previously sworn.

Further Cross Examination

Mr. Belli: Q. Mr. Krakauer, the last time you saw the book Mr. Wild had kept his records in, was in the other room, other than the room that you were in, is that right? A. I never saw it.

Q. You never at any time saw it, is that correct, sir? A. That is correct.

Q. And as I understand it, the only records which you kept for Mr. Wild, concerning his business, in, say, 1939, '40, '41, '42 or 1943—the only records whatsoever were these cards here in Government's Exhibit 7, 8, and 9, is that right?

A. I kept a record at my own suggestion, in his acquiescence, of the sleepers, which were not noted in the form. I kept them, and when this matter of the Shornick account came up, which I was not asked about, he desired to withhold information on it—

(Testimony of Julius Krakauer.)

Mr. Belli: We will see that you don't withhold information—

A. Mr. Hughes kept that until such time as he left to go to the Alameda Navy Airport, I think it was, when he had to leave there because of Government work.

Q. How did you keep those sleepers, in a book about the size of this one, here (indicating)? [619]

Mr. Campbell: I am going to ask, is this further cross examination, or is he your witness?

Mr. Belli: We would like to have him under cross, if we could. We haven't very much more.

Mr. Campbell: I suggest—I don't want to unduly extend this, but on the other hand I don't want to curtail the defendant from any defense he has to make. May we have an understanding as to how he is called here?

Mr. Belli: I would like to have him called under cross, if we may, your Honor.

Mr. Campbell: I think that is not proper at this stage of the proceedings.

The Court: You may recall him for further cross examination, Counsel.

Mr. Belli: Thank you, your Honor. This will be very brief.

Q. Mr. Krakauer, were those sleepers kept in a book like this (indicating)?

A. No, there were two or three tablets, such as I used in kindergarten, pulp paper tablets, such as you give children in kindergarten, so that they can have a lot of fun with them. Not being much

(Testimony of Julius Krakauer.)

of a fellow to spend much additional money when I had something I could utilize available, I used one of those tablets. There was two or three around the place, with a red cover on them. [620]

Q. Did that have a cover on it like this (indicating)?

A. No, a pliable flexible paper cover, which is one of those ordinary red tablets such as they use in school, a school tablet—rather thick.

Q. And outside of that flexible tablet, and outside of these cards, here, you kept no records, whatsoever? A. No. The only reason I—

Q. Mr. Krakauer, the question to you—will you answer precisely, please?

A. I kept no other records.

Mr. Campbell: The witness is entitled to explain his answer.

The Court: He is. You may explain your answer.

A. I only kept such records as were sanctioned by Mr. Wild, and some of them under his instruction.

Q. But you told us all of the records that you kept now, that being the record of the sleepers in the little book—

A. There was no little book, please understand, that is a tablet.

Q. There was no little book?

A. There was no little book. There was a tablet, and I described it as a pulp paper tablet such as is used in schools, with a flexible cover in red.

(Testimony of Julius Krakauer.)

Q. Thank you very much for making me understand that. There was no other book or anything like that that you kept, is [621] that correct?

A. That is correct.

Mr. Belli: May I ask that the witness be excused from the room for a minute while I make an offer, your Honor? I do this in all sincerity, and I want to make an offer to counsel in the presence of the jury, and excuse the witness.

The Court: In the presence of the jury?

Mr. Belli: Yes.

Mr. Campbell: That is a strange statement to make.

Mr. Belli: It is not so strange, in that I have laid a foundation here now, with this witness, and I have put him under cross examination, and I recall his testimony precisely.

I want to—it is necessary that I show counsel something before I show this witness. I would like to show that to counsel, without making any statement, whatsoever, in the absence of this witness. In other words, it is merely to show counsel this.

The Court: Concerning documents that ordinarily you would show counsel—as a matter of courtesy?

Mr. Belli: That's right.

The Court: In the absence of the witness?

Mr. Belli: That's right.

The Court: Maybe counsel will waive the courtesy.

Mr. Campbell: Yes, we will waive it.

(Testimony of Julius Krakauer.)

The Court: All right, courtesy is waived. Confront the [622] witness with it. Do you require any additional courtesy, Mr. Witness?

The Witness: I hope not.

Mr. Belli: Q. Did you ever see this before (indicating a book)? A. Yes.

Q. Is that the little school book that you were referring to? A. No, it is not.

Q. Is that one of the books that you forgot that you kept for Mr. Wild?

A. Yes, I admit that I forgot it. It was a cash account I kept for him. I admit I forgot it. It is my writing—only a cash account, however.

Q. You perceive that it is your writing, Mr. Krakauer? A. Yes, it is.

The Court: What is the significance of the book? By "cash book" what do you mean?

Mr. Belli: Q. You see Joe's name in there, Mr. Krakauer?

The Court: What is the book? Tell us what it is?

The Witness: It is a book—Jules asked me to keep the cash account—

Mr. Belli: Q. Asked you to keep what?

A. The cash account, that's all it is.

Q. That is what (indicating item)?

A. Here it says, "By cash to J. W. Personally," and here I [623] balanced it off. (Indicating.)

Q. "Cash to J. W. Personally." That is to Julius Wild? A. Yes.

Q. What is this "Artichoke" shown here?

Mr. Campbell: Let me see that, please.

(Testimony of Julius Krakauer.)

Mr. Belli: I thought you were going to waive the courtesy until he has been confronted—

Mr. Campbell: I ask that that be stricken, if the Court please.

(Discussion between counsel.)

The Court: Mr. Belli, don't indulge in that any more. I think ample courtesy has been extended to you and your client, as well as the Government. We are nearing the end of the trial. Both counsel have been very cordial to one another, and I assume we can continue to act that way.

Ladies and gentlemen of the jury, I admonish you to disregard the last statement by Mr. Belli as not evidence, and I will instruct you that the discussion between counsel, and the by-play, will serve no useful purpose in coming to a conclusion on the evidence. It is for you to assimilate the evidence under the instructions of the Court as to the law.

All right.

Mr. Campbell: May I now see the book, your Honor?

The Court: Yes. I assume at a proper time, Mr. Belli, you are going to make a disclosure where this book has been all this time? [624]

Mr. Belli: Yes.

Mr. Campbell: Can we inquire as to what date this book refers?

Mr. Belli: That is why I wanted counsel, if they had any objection—

The Court: There is no question about the authenticity. You confirmed that. Could you fix the

(Testimony of Julius Krakauer.)

date from the book? As we pursue this we might find a black book before we finish.

Mr. Belli: Q. You don't know where the black book is, do you, Mr. Krakauer?

A. Positively not, sir.

Q. Well, you did not know where this one was, either, did you?

The Court: You did not have it in your possession, did you? A. No, sir.

Mr. Belli: Q. You forgot that you even kept this, you told us.

Mr. Campbell: May we establish what it is, please? What period does it represent?

Mr. Belli: All right, what period does this refer to, Mr. Krakauer?

A. Let me see the book, and maybe I can tell you. I don't know.

Q. You haven't forgotten the book?

A. No, I admitted that I was asked to keep it. It was kept for a very short time, by the way. [625]

Q. Before I talk about this book, how about Dr. Shornick's records? Did you keep those, too?

Mr. Campbell: May the book be marked for Identification?

(The book was marked Defendant's Exhibit

O For Identification.)

Mr. Belli: Q. Mr. Krakauer, could you pause just a minute there now and put on your thinking cap and your memory, and see if you cannot tell us if you did not keep some other books for Mr. Wild?

(Testimony of Julius Krakauer.)

Mr. Campbell: We object to the question unless a period be fixed.

Mr. Belli: Any period.

Mr. Campbell: We object to the question.

The Court: Overruled. You tested his recollection.

A. I kept a record of his future book, for the Santa Anita Handicap.

Mr. Belli: Q. You did not testify about that when I asked you before.

A. You did not ask me about that. That was 1940, and I kept that for him, the bets that came in, and everything.

Q. What else did you keep, now, that you remember, in book form, Mr. Krakauer?

A. I don't think I kept anything else. I am not trying to hold back. I am trying to think of that.

I told you—I volunteered the information I kept the Shornick account, after Mr. Hughes left and abandoned it, [626] because he had to.

Q. How did you keep the Shornick account, in a book, or what?

A. Mr. Hughes kept it on a card, and I kept it in back of one of those—I believe in one of those tablets. In the front was the sleepers, and in the back was the other. That is my recollection.

That record only lasted about a month or three weeks.

Q. When was the last time that you saw the tablet with the sleepers in it?

(Testimony of Julius Krakauer.)

A. I handed it to Mr. Collard—handed him all of the sleepers at the same time.

Q. When had you taken these cards from Mr. Wild (indicating)? You took those before you handed the sleepers back to Mr. Collard?

A. I laid them right out on the table, there, and Jack Snell, whose name I could not recall the other day—

Q. Never mind Mr. Snell. When did you take these—referring to 7, 8, and 9?

A. Right in Mr. Collard's presence.

Q. In Mr. Collard's presence? A. Yes.

Q. But did you put them in your pocket, or how did you take them?

A. I put them in a paper bag, as I recall.

Q. You put them in a paper bag in Mr. Collard's presence? [627]

A. I am not sure as to that. I had some personal items, a sweater and some other things, and I put them all in a bundle and took them with me.

Q. You recall the incident of taking them?

A. I testified to that before, why I took them.

Q. When is the last time that you saw the Shornick account?

A. Well, the last time I saw the Shornick account—I got interested in it on account of keeping it, merely as a matter of fact when we paid Mr. Shornick off finally—Dr. Shornick, I would say.

Q. That was just a few figures on that book, one or two?

A. Yes, and then I kept the record of it subse-

(Testimony of Julius Krakauer.)

quently for my information, just ran it on down, you understand.

Q. You were not betting the system with Mr. Wild's money, were you?

A. I was not betting it at all, because there was no book that he kept it on.

Q. What was this, Mr. Krakauer, just a few figures, that you were keeping for your own information? First, is that in your handwriting?

A. Yes.

Q. What were you doing there, were you fascinated at that time by Dr. Shornick's system?

Mr. Campbell: Let him answer one question before another one is asked.

A. Let me look at it just a minute. [628]

Mr. Belli: Q. Yes, you take your time.

A. This is a record of a system that I had heard about, that I just kept a record of, but never used it.

Q. Whose system is that?

A. Oh, the books are full of systems, racing books, and so on. This is just a record that I kept.

Q. What are all those sums of money there on that, Mr. Krakauer?

Mr. Campbell: Just a minute. I am going to object. That has no materiality, unless it be shown that this was some record he kept for Wild, or has some relation to his business.

I make the objection that it is not material, if the Court please.

The Court: What is the basis of your question?

(Testimony of Julius Krakauer.)

Mr. Belli: To show that this man bet with Mr. Wild's money, your Honor, and that he kept other records than those which he swore to here, and to thoroughly discredit the witness and impeach him.

Mr. Campbell: May I see the document that you are referring to?

Mr. Belli: Yes, I offered it to you, and offered to put him outside, and you did not want it.

(Document examined by Mr. Campbell.)

Mr. Campbell: I submit the argument certainly does not support the assertion.

The Court: I will permit you to cross-examine the witness [629] on it, and the witness may then offer any explanation he has, on cross-examination.

Mr. Belli: Q. By the way, weren't you under indictment in the Federal Court—was it El Paso, Texas—about ten or fifteen years ago?

Mr. Campbell: Just a minute. That is objected to, if the Court please, as incompetent, and I ask that the jury be instructed to disregard it, and I ask that counsel be admonished as to that question.

The Court: The objection is sustained. The jury is instructed to disregard any reference made to any indictment, and as to jurisdictional matters in Texas or otherwise. Counsel, perhaps we better take the afternoon recess. I would like to see the attorneys after the session—unless you have another question, Mr. Belli.

Mr. Belli: There is just one question I would like to ask and then we will close, on that book.

(Testimony of Julius Krakauer.)

Your Honor has been giving me great indulgence, and I won't be long, and I won't impose.

The Court: Very well.

Mr. Belli: Q. Mr. Krakauer, now that you have seen this book, here, and you remember keeping it, you tell us this is a cash book for Julius, is that right? A. No, this is his cash account.

Q. That is his cash account? [630]

A. Yes, what he drew, his salary and all that. It was only kept a little while.

Q. Did you know Artichoke Joe?

A. Never saw the man in my life.

Q. Never saw the man, and you would not know him if he stepped into the courtroom?

A. No, sir, I know him by reputation—

Q. You know him by reputation?

A. Yes, everybody knows something about Artichoke Joe, apparently.

Q. Well, we do now—

A. I have seen his name in the paper, and all that sort of thing.

Q. If you look in the book you will see his name in the handwriting of yourself.

A. It might possibly be, sir.

Q. It might possibly be? A. Yes.

Q. Would you look and see if it is?

A. I never saw him, though.

Q. What does that say?

The Court (reading): "1. Artichoke, Credit, \$500."

The Witness: That is January 1st.

(Testimony of Julius Krakauer.)

Mr. Belli: "January 1st," not "1 Artichoke"?

A. Yes.

Q. What does that mean, in your handwriting?

A. Credit, \$500, and then I bring this over here, and that makes \$952. These are all Jules' personal items (indicating). Here is his salary for the day, carried on down.

Q. How about that "1 Artichoke," January 1st? That is \$500. Even for a man as frugal as you are, \$500 would be such a sum as you would—

Mr. Campbell: I object to that as argumentative, if the Court please.

Mr. Belli: Let me withdraw it and re-ask it, then.

Q. Do you recall, in your own handwriting, what that \$500 was for—to Artichoke Joe?

A. \$500 probably that Jules spent with him.

Q. Oh, come, now, you kept the books, didn't you?

A. Yes.

Q. What was it for?

A. It must have been a bet, because I did not even know Artichoke Joe. He must have bet with him for \$500.

Q. We find Artichoke Joe's name in there more than one time. You did not know who he was, or anything about him?

A. No, sir, I never saw him. I have gone down there. I have taken money to Artichoke Joe's place on Sixth Street for Jules, and I have collected money—

Q. And you never saw him?

A. I went to what was supposed to be Arti-

(Testimony of Julius Krakauer.)

choke Joe's place, but I never saw the man. I told you outside of Court that I [632] did not know the man personally. I told you I never saw him, and I didn't.

Q. As a matter of fact, you know of your own knowledge, don't you, that there was a lot of money lost by Jules, in the other room, that was not reflected in these cards here?

The Court: When?

Mr. Belli: 1941, '42 and '43. Am I not right?

A. I don't believe you are. I kept no record of it.

Q. Well, you kept records in these books, don't you, of the money that was lost by the runners?

A. No, sir, that was Jules' personal cash account. I only kept it for a little while.

Q. What did you do with reference to this Artichoke Joe, when Jules came and told you to put \$500 credit to Artichoke?

Mr. Campbell: May I have the time, please, of this?

Mr. Belli: Your records are the best evidence as to when he kept them.

Mr. Campbell: He was never asked when he kept them.

Mr. Belli: Q. You are being asked now. Mr. Krakauer, when did you keep those records?

A. I am quite sure it was before 1941.

The Court: To refresh your recollection, look at that book, Mr. Krakauer. There must be some information there that would help.

(Testimony of Julius Krakauer.)

A. Well, I see right there—(pointing). [63?]

Mr. Belli: Q. You just pointed to “Sammut.” That is Artichoke Joe, isn’t it? And here is “Gandy.”

Mr. Campbell: Let him answer the first question.

Mr. Belli: There are so many that occur to me, you will forgive me if I become a little repetitious.

A. You are giving me one of these runners that Mr. Hughes handled.

Q. Those are the men Mr. Wild lost money to, weren’t they, Mr. Krakauer?

Mr. Campbell: If he knows.

Mr. Belli: If you know.

A. I told you, all I know, with reference to these very limited items here, is what I put down here.

Mr. Campbell: May I finally have the date when that record was kept?

Mr. Belli: Would you like, tonight, at home, to see if you could find any more records that might assist us? A. I have no more records.

Mr. McMillan: May we have an answer to that question, if your Honor please, before we go on to a few more?

The Court: As to the date?

Mr. McMillan: Yes.

The Court: Yes.

Mr. McMillan: There has been no foundation laid for it, [634] your Honor, for this testimony and these questions.

The Court: The witness has been asked the ques-

(Testimony of Julius Krakauer.)

tion. I have given him an opportunity to answer.

A. Your Honor, the date here is not stated in here, if he desires not to put a date in here.

Mr. Belli: Who desires not to put a date in?

A. I just did not put a date in.

Q. Maybe if you look toward the end of it there, Mr. Krakauer, you might be able to tell, from some of the horses that were running, and it might refresh your memory, too, that you kept a winter book.

Mr. McMillan: Is that a question?

Mr. Belli: If you want to stipulate to a statement, I will stipulate to it. I think the witness understands.

A. This, here, is the winter book.

Q. Did you keep a winter book?

The Court: Permit him to answer the question. Go ahead.

A. Just from the identification here, this is the cash account of the winter book—not the horses, because they were kept on cards from day to day. That was in January of 1940.

The Court: January, 1940? A. Yes.

Mr. Belli: Q. Then you kept a winter book, too, you recall now? A. I told you that.

Q. When?

A. A moment ago, when you asked me.

Q. You mean before I produced the book to show that you kept it?

A. Mr. Belli, the winter book was kept on cards, and I just entered the debit or credit on the posi-

(Testimony of Julius Krakauer.)

tion every day, and right here is the cash account with reference to it.

Q. Let's see, Mr. Krakauer, do I understand that you kept the winter book on cards?

Mr. Campbell: Of what year, please?

The Witness: 1940, which must have been the winter book, because that is the only winter book I had anything to do with.

Mr. Belli: Q. What did you do, destroy the cards and put the winter book in this (indicating)?

A. No, that is just the cash account.

Q. The cash account for the winter book?

A. Yes.

Q. Who kept that? A. Right here—myself.

Q. You kept it, yourself, didn't you?

A. Right here, this is it, right here.

Q. That is in your handwriting? A. Yes, sir.

Q. Who kept it in 1941, '2 and '3?

A. There was no winter book kept to amount to anything in those years. The only real winter book that amounted to [636] anything was in 1940, the Seabiscuit race.

Q. And who kept that?

A. The Seabiscuit bets were taken by Mr. Hughes, and by a good many people, and written on cards, and at the end of the day, I would take and figure up the position in cash and put it in it.

Q. What about 1941, '2 and '3?

A. Jules kept it.

Q. Did you put it in here?

A. No, sir, Jules kept a winter book, that he

(Testimony of Julius Krakauer.)

kept, his own, which was very limited because of the very sad experience we had had on Seabiscuit.

Q. You say that book he kept?

A. He kept it on cards.

Q. In his desk, right-hand side? A. No.

Q. Where did he keep it?

A. I don't know that he even kept the book on it.

Q. You don't know that he kept it now?

A. No, sir.

Q. Did he or didn't he?

A. He had a very limited winter book that he took a few bets for on.

Q. Did you see him keep a book with those records in it?

A. No, that was a winter book. I mean the term of writing [637] up bets on a future race, that is what we call the winter book. That don't mean entering in a book.

Q. When did he keep those records?

A. I really don't know.

Q. Oh, you don't know? A. No.

Mr. Belli: Can we take the recess, your Honor? I have more on the subject for tomorrow.

Mr. Campbell: I could not hear that last statement of counsel.

(Statement repeated as above.)

The Court: So that we may understand the testimony thus far, it is admitted, although it is garbled—Do I understand you, Mr. Krakauer, to testify to this court and jury that the book to which

(Testimony of Julius Krakauer.)

counsel has referred you—you referred to it as a cash book, represents the winter book for 1940?

A. No, sir, the front part of it is Mr. Wild's salary in there, in his cash account.

Q. Do you recall the year or the years over which that account may have extended?

A. From the winter book—what I mean is not a book, you understand—it must have been 1940.

Q. Using the term “winter book” that is a part of the cash account? [638]

A. Just the cash account of the winter book.

Q. You now refresh your recollection to the extent that the account therein referred to is 1940?

A. Yes.

The Court: All right. Now, this piece of paper—so there will be no question about it between now and tomorrow morning—handed to you by counsel, which bears no identification mark on it—it better be identified.

Mr. Belli: The cash book, so called, that is identified as Exhibit O.

The Court: All right.

(Thereupon the clerk marked the sheet in question as Exhibit P for Identification.)

The Court: Let me see the sheet, please.

(Exhibit P examined by the court.)

The Court: This you say you kept for your own personal information?

A. I was using a system that I thought might work, and I worked out problems of this kind, and

(Testimony of Julius Krakauer.)

I kept it to see what the record might be, if I bet out, which I did not do.

Q. When, to the best of your recollection, did you keep that account, over what period of time?

A. Well, being in that book that way, I would not want to say.

Q. By references to the horses' names could you tell?

A. There is a possibility it could be identified, but that [639] is very unlikely. I don't know.

Q. So tonight, if you have an opportunity, you might be able to refresh your recollection by looking at the various names of horses, could you?

A. I would be very glad to. I have no written record.

Q. The names of the horses might refresh your recollection? A. I would be very glad to try.

The Court: In summary, then, as I understand your testimony, that record was kept by you for your own edification, your own benefit, merely, as the net result of a system that you used, or you would have used—

A. Would have used if it had been of any value.

Q. The amounts indicated thereon, in dollar value, do not in any sense of the word represent losses or benefits, either to you or to any other person or persons? A. Absolutely.

Q. And that is a true statement?

A. Absolutely.

The Court: All right.

Mr. Belli: Q. In this book I found this too: Is

(Testimony of Julius Krakauer.)

this what the sleepers were kept in? I refer to a little manila envelope, here.

A. No, all of our checks, that were not even sleepers, that people left, were all put in an envelope, and in the morning they were paid out in these envelopes. [640]

Q. Is that your handwriting on it?

A. That is service. We put the money for the service in there. That is my handwriting.

Q. The money goes in here?

A. Yes, that is service.

Q. Do you know what this would be doing in this book, here, assuming it was found in that manner (indicating)?

A. Oh, I don't know. That would not mean anything, because, as I say, the service was put in there, and maybe somebody else had already made up the service envelope, and that one was in there.

Mr. Belli: Shall we take the recess, your Honor?

The Court: We will take the afternoon recess, ladies and gentlemen, and we will resume the case tomorrow morning at 10 o'clock.

Mr. Campbell: I think the previous arrangement was 10:30 tomorrow morning.

The Court: 10:30. Mr. Belli, you have a matter in the State court?

Mr. Belli: That's the one I spoke to you about, with Judge Schoenfeld.

The Court: We will resume at 10:30, then, tomorrow morning, ladies and gentlemen.

(Testimony of Julius Krakauer.)

(After the usual admonition to the jury, an adjournment was taken until tomorrow, Thursday, August 19, 1948, at 10:30 o'clock a.m.)

Thursday Morning Session, August 19, 1948.

10:30 a.m.

The Clerk: United States vs. Wild, on trial.

Mr. Belli: Ready.

Mr. Campbell: Ready.

The Court: The jurors are present, gentlemen; you may proceed.

JULIUS KRAKAUER

Recalled, previously sworn.

Further Cross Examination

Mr. Belli: Q. Mr. Krakauer, with reference to this book that I showed you the other day being kept in your handwriting—(Addressing the Court) We offer this new evidence as defendant's exhibit next in order, if your Honor please.

Mr. Campbell: I have no objections.

Mr. Belli: May it be so marked.

The Court: So ordered.

(Thereupon the book above referred to was marked as Defendant's Exhibit O in evidence.)

The Court: You will refer to that in the future as the cash book or what?

Mr. Belli: Yes, the cash book or Defendant's Exhibit O.

Q. Does that refresh your memory that you might have [642] kept other books for Mr. Wild, Mr. Krakauer?

(Testimony of Julius Krakauer.)

A. That was kept such a short time I may have kept some other records that have gone out of my mind, sir. I don't want to make a positive statement that I didn't keep something just like this that you brought here, which I tried to elaborate on, if your Honor will permit me. I will be glad to give you the further information.

Q. As I understood your testimony when you were first on the stand you told us with reference to your own records that you could tell us any minute of the day going back into the past how things stood, was that correct?

A. I did sir, and I brought you information I found after I made that statement. I brought you the record of the 25th of September, the 24th, on one document and the 23rd on another.

Q. Can't you tell us what other books you kept for Julius rather than saying you may have kept other books?

A. I don't think I kept any more.

Q. But you can't be positive?

A. No, I wouldn't make it positive, because this was kept for a period of a very short time. I may have kept a record of that kind for a short time. It was not even balanced off.

Q. Was it your testimony after you stopped keeping this book, and you did keep this one, didn't you?

A. Yes, that is my handwriting. How could I deny that? [643]

Q. How did you or how could you?

(Testimony of Julius Krakauer.)

A. How could I?

Q. How could you, that is better. After you had this book, did you keep another book for the same entries, the same type of business continued?

Mr. Campbell: That's objected to as assuming facts not in evidence.

Mr. Belli: Withdrawn.

Q. Mr. Krakauer, it shows in here you were doing business with, who was a "Tom Boone," or is that? I can't read your writing.

Mr. Campbell: I object to counsel's statement that you were "doing business with" and then ask a question, the implication being that is some transaction of this witness.

The Witness: That is "some book," I write very poorly.

Mr. Belli: Q. From which book?

A. From the book, and this is Mr. Wild's personal cash account.

Q. Yes.

A. From the book, whether from those cards or from some other records or from the book he received that much money.

Q. This cash book I am showing you, Exhibit O here by the defendant, that shows entries in there to Yama, Artichoke JO, and some of these other runners, doesn't it?

A. If they are in there, it does.

Q. They are, so you can take my word for it.

A. Yes.

Q. You think this book was around 1940?

(Testimony of Julius Krakauer.)

A. Only by the fact there was some other information in the back of that account of the cash account of the winter book is the only reason I say that. It is not dated, sir, that's correct.

Q. But it is around 1940?—Maybe 1941?

A. Could be.

Q. Now, Mr. Krakauer, Mr. Wild's type of business or character of business did change between 1939, 40, 41, and 42; by that I mean he was doing business over the telephone and in what we call a one-room and with the runners doing business in the other room in which you were the man in charge, the same type or character of business?

A. May I correct that? I was not the man in charge.

Q. Please let me finish the question. It is laborious enough, Mr. Krakauer. A. O. K.

Q. I will start all over again: was there any difference in the type of business Mr. Wild did in 1939, 40, 41, 42, and 43 with reference to his taking bets over the telephone in one part of the establishment and his taking bets from people over the counter in the other part of the establishment?

A. No, there was no change in the manner of doing it.

Q. Now, if this is for 1940 or 1941, it indicates references by [645] you to Artichoke Jo, Yama, and the rest of the others.

A. If there are any others in there, why, I believe they would. There is no question about that.

Q. And you kept those records, did you?

(Testimony of Julius Krakauer.)

A. For the short period indicated there, yes.

Q. And Yama and Artichoke Jo did their business in the other room, in the room you were in?

A. They did not do it in the other room entirely.

Q. But they did most of it in there, didn't they?

A. May I be allowed to tell you, to use Yama as an example?

Q. If you would just answer the question first, please, Mr. Krakauer.

A. I don't think they did most of it in the back room. I wouldn't want to state what percentage they did in there—

Q. You show me any place on these cards, 7, 8, and 9—and you told us already the type of business didn't change. You show us anywhere on these cards, 7, 8 or 9 where Yama or Artichoke Jo or any business that is done in the other room, where that is here?

Mr. Campbell: Just a minute, I stipulate no names appear there.

The Court: That does not satisfy the question.

Q. Do you understand the question?

A. Yes.

The Court: It is a broad and comprehensive question. [646] Can you answer it?

A. Yes, the business of the runners, if any done in that room as runners, is not reflected in those cards. I make it definite. I have no desire—I'm here under oath.

Mr. Belli: Q. All right, we take this book here, Exhibit O, the cash book, and we show in there that

(Testimony of Julius Krakauer.)

you have made entries for Yama, Artichoke Jo, and the people who were running in the other room there. Now, can you tell us when this book was stopped and right at the begining of this period, 1940 and 1941, did you keep those records after this period in another book?

A. I don't believe I did.

Q. You say you don't believe you did?

A. No, I'm quite sure, but I don't believe I did.

Q. Now, on a thing like that, I question you for a positive answer. Will you tell us positively that you didn't, or will you say that you are not sure?

Mr. Campbell: I object to that. He has given his answer to the best of his recollection.

Mr. Belli: It is my understanding to be—

The Court: I will allow the question.

Mr. Belli: Q. The question is, again, Mr. Krakauer, and I want an answer either that you are positive or that you are not sure or that you don't remember.

Mr. Campbell: Just a minute, the counsel cannot insist on what the answer be—He can simply put the question. [647]

The Court: No, he has given the witness several alternatives.

Mr. Campbell: No, but he says, "I insist it be this or that."

The Court: The witness understands just what he means, I think.

Q. You understand the question?

A. Yes, I do.

Q. You are thoroughly conversant with it?

(Testimony of Julius Krakauer.)

A. Yes.

The Court: All right, you may answer the question.

The Witness: A. I am not sure.

Mr. Belli: Q. You are not sure?

A. Yes, sir.

Q. The other day you told the ladies and gentlemen you did not make any entries in the black book and you never saw it, didn't you?

A. The entries in the black book I didn't make. I am quite sure of that.

Q. But you are not sure that you have made entries with reference to these runners, Artichoke Joe, and Yama, Shufflin Sam, Ten Grand Patty, and the rest of them in some other book, is that right? A. I am not sure.

Q. Let's see if we can jog your memory a little bit more here: [648] do you have any recollection what type of book that might be that you kept these other records in? A. I am not sure.

Q. You are not sure. Did you look around your home last night to see if you could find any of the books? A. I have nothing further in my home.

Q. What other books did you take from Mr. Wild when you signed the statement that you were not taking any records? A. Not a book.

Q. You just lied about these cards, is that right?

Mr. Campbell: That is objected to—

The Court: Objection sustained.

Mr. Belli: Q. Well, you just made an unfactual

(Testimony of Julius Krakauer.)

statement with reference to these cards, is that right?

A. If that is the legal way of putting it, I have explained how I came to take those cards, and I stand on that explanation.

Q. Give it to me again, will you please, just briefly—your motive in taking these cards and signing this paper that you didn't take them? Was it that you were going to be haled into court by Uncle Sam for taxes?

A. Because here is what happened and I try to repeat as I recall my testimony. The evening before Mr. Wild and myself had had some words with reference to these sleepers that have been mentioned here, and I took the record of the sleepers and showed him that I had been giving out some of these in [649] pursuance of an agreement that we had come to that it might be a good idea as a sort of an advertisement and gesture of good will to give some of these out, even though the people were not entitled to them as a matter of honesty, or anything of the kind. There was no deception on it. They just bet on the wrong number, and I called his attention to some of the people I had given these, and therefore there was a reduction in the amount of sleepers he received. I thought the thing was settled. The next evening, which was Saturday evening, the close of the week, he was about to go. Everybody else was gone except Mr. Jim Snell, sitting at the desk where he had some figuring and Jules came up and said, "Clarence, check Mr. Kra-

(Testimony of Julius Krakauer.)

kauer out." I said, "What do you mean?" "Well," he said—again mentioned the sleepers, and I said, "I thought I had explained that." He says, "Never mind,"—no, I would like to correct that, he says, "Give Collard charge of the sleepers." I says, "Do you mean give him charge of the sleepers and I am to continue to work?" He said, "If you want to." I said, "I am quitting under those conditions." And he told Collard then to check me out, and he went through the door which he has mentioned before as coming from the elevator, walked out, came back and said, "Now, don't try to do me any harm with reference to this tax matter, because you are in it as deep as I am." He went out then and he didn't return. [650]

I then gave my key to Collard, and the sleeper book, with three or four sleeper envelopes, and I then took these cards, laid them out there and told Mr. Collard that I was taking them for the purpose that I have indicated.

Q. No, you haven't indicated yet. I would like to know.

A. Well, to protect me against the possibility of Mr. Wild and the statement he made that I was in this as deep as he was, to protect myself.

Q. Will you also show the ladies and gentlemen of the jury, Mr. Krakauer, how you could be involved in any tax matter by reason of these cards?

Mr. Campbell: I object as incompetent, irrelevant, and immaterial. He was asked for the motive and he was giving the motive.

(Testimony of Julius Krakauer.)

Mr. Belli: Q. And as I understand your motive, it was so that Uncle Sam wouldn't come back at you for taxes?

A. Not for taxes, but any question as to Mr. Wild's taxes—I am not a lawyer. I don't know anything about the law. I pay my taxes when they become due, and I simply couldn't take a chance of protecting myself, especially in view of the fact that I made eleven cards at the dictation of Mr. Callahan which were not in keeping with the records.

Q. At the dictation of Mr. Callahan?

A. Yes, and I repeat that unequivocally.

Q. You heard Mr. Callahan testify? [651]

A. Yes, I did.

Q. Mr. Krakauer, I want to ask you with reference to making up those cards, you saw the black book and the figures from the book when you made up the 12 cards, did you?

A. Mr. Wild didn't give me the black book to make them from. Mr. Callahan dictated those figures to me.

The Court: Will you answer the specific question? There were 12 in number and you made 11.

A. Yes.

Q. And at the time you say Mr. Callahan dictated the subject matter to you? A. Yes.

Q. And you in turn incorporated the subject matter in those cards? A. Yes.

Q. Now, at that very juncture did Mr. Callahan

(Testimony of Julius Krakauer.)

or any person have in your immediate presence the black book? A. No, sir.

Q. To your knowledge did they incorporate any figures from this black book into those cards?

A. No.

Mr. Belli: Q. Did Mr. Callahan give you all of those figures out of his mind?

A. He may have prepared something in advance for those figures to confirm. [652]

Q. You say he may have.

A. He may have had them in his mind, because he was unhesitant about giving the figures. He didn't hesitate.

Q. You have a recollection, as you say now, of Mr. Callahan giving all of these figures out of his mind? A. No, sir.

Q. Well, what did he have in front of him?

A. He had a typewriter with a paper in it, and it was at a counter we had behind which were a lot of old bound form charts, and we had a typewriter. In fact, I used that for myself to write letters, and also for Jules and his dictation. He had this paper in the typewriter and as Mr. Wild had asked me to give him these figures I went over there and he handed me these cards and gave me two sets of figures for each.

Q. Did he take the paper out of the typewriter?

A. No, sir.

Q. Was he sitting at the typewriter desk?

A. Standing.

Q. He was standing at the typewriter and calling off the figures to you? A. Yes, sir.

(Testimony of Julius Krakauer.)

Q. No question about that?

A. He gave me figures, yes, there is no question about that.

Q. You saw him come into the room, did you?

A. Yes, sir, I believe I did. [653]

Q. What did he copy from to put the figures on?

A. Wait a minute, I don't remember if I saw him come in the room. He might have come from the elevator. I wouldn't want to say I saw him come in the room.

Q. What did he copy from to put the figures in the typewriter? A. I wouldn't want to say.

Q. Didn't you see something that looked like a book?

A. I told you he had a sheet in the typewriter.

Q. In the typewriter? A. Yes, sir.

Q. Wasn't he looking at something to put those figures on the typewriter?

A. Looking at the sheet in the typewriter, yes.

Q. And he was taking these figures out of the air? A. No, I don't believe he was.

Mr. Campbell: If he knows.

The Witness: That's correct, I don't know.

Mr. Belli: Q. You saw him there with the typewriter, sitting there and you were writing these down? A. Yes, sir.

Q. Can't you tell when a man is copying figures from a book, black, or white, or any other color, or picking them out of the air like that?

Mr. Campbell: I object as argumentative

(Testimony of Julius Krakauer.)

The Court: Sustained. [654]

Mr. Belli: Q. You are not prepared to tell the ladies and gentlemen of the jury now, even though you recall the incident of Mr. Callahan sitting there at the typewriter, typing, where he was copying figures from a book or anything else?

A. I say definitely he was not copying figures from a book, because there was no book there except the sheet in the typewriter, and the typewriter and the twelve cards which he handed me.

Q. Was he copying them from anything, or was he taking them out of the thin, blue air?

A. He was not taking them out of the air because there was something on the sheet in the typewriter.

Q. Before he put it in there?

A. How do I know? I was not there when he put it in.

Q. And you don't know what he was copying these from as he was giving them to you?

A. Presumably from the sheet in the typewriter. sir, but there was no book there, however.

Q. Now, Mr. Krakauer, you have told us, and I will pursue you once further on this, that you recall Mr. Snell in the room at the time of your departure; you recall the conversation with Mr. Snell almost word for word, don't you?

A. I didn't talk to Mr. Snell, sir.

Q. You recall you didn't talk to him. Do you recall a conversation [655] that Jules had?

(Testimony of Julius Krakauer.)

A. May I say this, I did talk to Mr. Snell, and bid him good-bye.

Q. Do you recall what you said and what he said?

A. He said he was quite sorry that a long friendship that existed between Mr. Wild and myself should end this way. In fact, he gave me a book to read, or lent me a book to read, but I have lost his address and couldn't return it to him.

Q. You remember this conversation with Snell, these details about how sorry it was that a long friendship should end and so on, and yet—

A. Naturally I would remember that.

Q. But you recall all that word for word, and you recall the language with Mr. Callahan almost verbatim that you had at the bank?

A. Yes, sir.

Q. Yes, as a matter of fact, you recall most of those incidents during that last year of 1943 very well, don't you?

A. Yes, sir.

Q. Can you tell us, Mr. Krakauer, why you cannot remember whether you kept the other records for Julius in this period of time, or not? Do you have a failure of memory or just one subject?

Mr. Campbell: Objected to as argumentative.

The Court: Sustained.

Mr. Belli: Q. You have a failure of memory just on the [656] one subject, is that right?

Mr. Campbell: Same objection, if the Court please.

The Court: Sustained.

Mr. Belli: Q. Do you want to give any further explanation to the ladies and gentlemen of the jury

(Testimony of Julius Krakauer.)

with reference to your not being able to remember whether you kept any other records, or not?

Mr. Campbell: Same objection. It is an incompetent question. He is a witness on the stand, and if counsel has any proper question, he can place it.

The Court: Sustained.

Mr. Belli: That's all, Mr. Krakauer.

Redirect Examination

Mr. Campbell: Q. I am going to call your attention again to this Exhibit O, a book labeled "Day Book,"—is it your best recollection, Mr. Krakauer, that the entries in there, I notice, in December and January refer to December '39 and January 1940.

A. That is my best recollection. That was poor bookkeeping on my part. Every bookkeeper should put his dates in, but I didn't.

Q. But that is your best recollection?

A. That is my best recollection.

Q. I call your attention to the last few pages of the book, being pages 199 and 200, page 199 being headed "Seabiscuit," [657] and page 200 containing certain matters being a total markers and cash.

A. Yes, sir.

Q. And you have stated, I believe, that that reference to a future book on Seabiscuit.

A. That was the cash position on the winter book, and when I say "winter book" I don't mean he kept it in a winter book. That winter book is a term describing the operation of taking future bets. I want that clearly understood.

(Testimony of Julius Krakauer.)

Q. I understand. Now, these transactions referred to here as the winter book on Seabiscuit; it was in March of 1940 that Seabiscuit ran in the Derby at Santa Anita, or the handicap, whichever race it was, and it was in connection with that race that the future book or winter book you refer to was kept? A. Yes, sir.

Q. So that I call your attention to the fact that the last entry here is February 24. That, I take it—

A. The winter book closes. I don't know what the rule is, but that probably was the closing date of the winter book when no more bets were accepted.

Q. February 24, 1940?

A. Yes, they close in advance. I don't recall the rule on that. In fact, I am not even acquainted with that, even with the experience I had with Jules about the technical part of the [658] winter book, and things of that kind; but they do close in advance, several weeks before, and they don't take any more bets.

Q. Now, I am going to call your attention, as an example, to card No. 1, the period of time ending January 4, 1941, and ask you to compare that with the entries as of under January 4, in Defendant's Exhibit O, and ask you if they bear any relation one to the other as to the amount of cash withdrawn by Julius from the transactions represented on the card, of the salaries and those recorded in the book?

A. Will you please repeat that?

(Testimony of Julius Krakauer.)

Mr. Campbell: I will reframe the question.

Q. Will you state, as shown by that card, how much cash Jules received on January 4, 1941, either by withdrawal or by way of salary?

A. \$50—\$30 for salary—and \$50.

Q. I call your attention under date of January 4, here, there is listed—what are the salary items there?

A. \$10 and \$5.

Q. \$15?

A. Yes, and by the way I call your attention to that “X”—that is extra salary.

Q. \$15 he drew on that day according to this book?

A. Yes, sir.

Q. And what did he withdraw from the book of horse operations? [659]

A. \$110.

Q. So that the figures in this book have no relation to the date of January, 1941, is that correct?

A. I am quite correct on that, sir, and apparently the figures bear that out.

Mr. Campbell: That's all.

Recross Examination

Mr. Belli: Q. Wasn't there another book kept, Mr. Krakauer, of the telegraphic bets around the State?

Mr. Campbell: What period, Counsel?

Mr. Belli: '41, '42 and '43.

The Witness: A. That was only kept with reference to two accounts in Modesto, one a doctor whose name, if I recall it, I don't think I should mention. He is still there.

Q. No, I wouldn't mention any names at this

(Testimony of Julius Krakauer.)

stage of the game. I appreciate you haven't before. It seems that doctors all bet on the horses, though.

A. I wouldn't know; I wouldn't say as to that.

Q. But how about the other fellow who had the account with you, was he a doctor, or a lawyer, or what?

A. He was a ranch owner. I also remember his name and I don't want to mention it. He was a big prune grower, whose name I don't want to mention.

Q. Who took whom on that account, do you remember? [660]

Mr. Campbell: Just a minute, what period are you referring to?

Mr. Belli: '41, '42, and '43.

The Court: I cannot see the materiality unless you establish the date.

Mr. Belli: If it shows there was a loss—

The Court: What are the dates?

Mr. Belli: '41, '42, and '43.

The Witness: I think they were in that period, yes, sir.

Q. Where do those accounts appear, in what book?

A. They were kept on cards day by day.

Q. Who kept those?

A. Mr. Hughes and myself. Mr. Hughes kept them and I kept them as they came in, and we checked every night. You asked me who took who?

Q. No, that was the other question a moment ago. Let us stay on this question now. Did you

(Testimony of Julius Krakauer.)

take those cards with you, the prune growers cards and the doctor in Modesto.

A. The doctor stopped betting a long time before I left there.

Q. When did he stop betting?

A. Oh, I should say along in 1942.

Q. These cards go back to 1941—some of them?

A. Yes.

Q. Did you take the doctor's cards and prune grower's cards?

A. When that transaction was all over they were of no future [661] value. They were paid off. The money was wired to him from the Powell Street office of the then Mackay system.

Q. You ever recall the place you wired it from?

A. Because I wired it—

Q. You wired it, yourself?

A. No, I wired it on Mr. Wild's instructions. It was part of my duty. The money was wired to him, if he had anything coming.

Q. Don't you recall keeping records with reference to these bets?

A. Mr. Hughes and myself?

Q. That is another record you recall keeping that you didn't the other day.

A. That was just a daily card. The man wired his bets in, and Mr. Hughes had them, because he was in charge of the room.

Q. Where are those cards?

A. After they were through they were of no further use, because the telegram, itself, was the

(Testimony of Julius Krakauer.)

evidence. The numbers of the horses were listed on the telegram and everything.

Mr. Campbell: Q. Do you know where the cards are, Mr. Krakauer? A. No, I don't.

Mr. Belli: Q. You didn't take those with you?

A. They were not in existence any more.

Q. Were they torn up? A. Yes. [662]

Q. Did you tear them up?

A. Oh, no, sir.

Mr. Belli: All right, Mr. Krakauer, that's all.

Mr. Campbell: That's all.

The Witness: Judge, do you want me to give you anything further on this?

Mr. Campbell: Oh, yes, there was some question asked yesterday. Mr. Belli produced this and it was marked "P For Identification," a sheet which you state you kept for your own amusement, or edification, that you were experimenting with and you were asked if you could ascertain the dates that this record was kept. A. Yes.

Further Redirect Examination

Mr. Campbell: Q. Have you been able to do so?

A. The Judge asked me whether it was kept for my own personal benefit and profit, and I saw enough on here quickly, although my eyes are slow, that I could answer that truthfully "No." This is a further elaboration that I kept for my own, just simply fascination of the Dr. Shornick or operator No 1 system.

The Court: Q. Explain that to the jury.

(Testimony of Julius Krakauer.)

A. I call your attention, your Honor, that these sums shown there is another sheet which hasn't been furnished me, and the sums have been carried forward.

Mr. Campbell: Q. Were the bets set forth here actually [663] made? A. No, sir.

Q. They were theoretical bets?

A. They were theoretical bets based on this system that Dr. Shornick used. [663-A]

Q. Were the losses paid or the winnings actually received?

A. No, except to this extent, in order to bring forward and get the results which I was trying to establish what kind of a profit it would make, I brought forward from the Shornick account the actual figures, and down here you will see what the doctor won.

Q. That is \$2790?

A. Yes, and these are the payments he received; in order not to bring elaborate figures forward, I brought these.

The Court: Q. Is that a transcript of the doctor's winnings and his account?

A. Just down here.

The Court: Q. I am a little confused. Start all over again. Is that a transcript of the doctor's account or not? A. Well—

Mr. Campbell: Q. Will you take this sheet, Mr. Krakauer, and state in your own words just exactly what that is, how it was kept, the purpose for which it was kept, and whether or not the transactions there actually were made.

(Testimony of Julius Krakauer.)

A. This is an elaboration of this doctor's account and here were the totals brought forward and continued down here and it shows that there was \$200 bet to place, as Mr. Hughes testified, and here are the odds and here is the track and here is where the horse won and what position it won and carried on down here; and then in order to account for myself getting a [664] true picture of what the system was, it was the one way I brought forward the totals of the results of the doctor's account, his actual betting. Understand, over the period he bet, I continued as if he had not stopped.

Q. Let me get this straight, then; this figure which you have here on the bottom of \$2790, is that the figure which the doctor that you referred to actually won in 1941, is that correct?

A. Yes, whatever year he bet.

Q. Then do I understand that after that transaction was over, you on a sheet of paper which is Defendant's Exhibit P for identification, carried on the same system in theory?

A. Just to see what it would result in, finally, that is all.

Q. But the entries you have here of horses, the track and so on, and bets and the debit or credit, those were not actual transactions, is that correct?

A. Yes, sir, that is correct.

Q. This figure that you have of \$2790 is the figure which the doctor actually won while he was operating that system?

A. That's correct, sir.

(Testimony of Julius Krakauer.)

Q. And was placed on this sheet for comparison with the system as you were attempting to work it out, is that correct, sir? A. Yes. [665]

Mr. Belli: May I ask something on voir dire?

The Court: Yes.

Mr. Belli: Q. I thought you told us yesterday, Mr. Krakauer, that had nothing to do with the Shornick account. A. I didn't say so.

Q. You didn't say so? A. I did not.

Q. It was entirely separate from the Shornick account; don't you recall telling us that?

A. I don't think I did. I don't believe that is in the testimony.

Mr. Campbell: Q. These entires are not the Shornick account entries?

A. No, except as they are reflected in the total from another record entirely.

Q. The total being \$2790? A. Yes.

Q. And that was just for comparison purposes, is that correct?

A. Yes, I thought I made it plain.

Q. May I ask you, on the theoretical system which you kept, I notice the dates run from 5/31 to 6/36. A. Yes, sir.

Q. That would be from May 31 to June 6. During that period of time, for my information, would the system have won or lost?

A. It would have won. [666]

Q. How much would it have won during that period?

A. It would have averaged around, which I

(Testimony of Julius Krakauer.)

have here—of course I haven't rechecked these figures—about \$600 a month.

Q. About \$600 a month? A. Yes.

Q. I think you stated yesterday, however, that no bookie would accept his system, is that right?

A. Well, I won't say that—go ahead.

Q. I believe you stated also that the bet was accepted for about a period of three months by Mr. Wild.

A. I am not sure of that. The other day when—

Q. Well, how long was it?

A. I would say about two and a half months, not quite three months. Maybe it was longer than that, but I don't think so.

Q. Does that figure, \$2790, represent the entire winnings of Dr. Shornick during that period of time?

A. I believe so. It was taken from another record and that I can't tell you positively, but I am quite sure that represents the entire winnings.

Q. Coming back to this Exhibit Q, I am going to ask you, did you ever see this book again after you left Julius' employment, and by that I mean Julius Wild? A. No, sir.

Q. You have never seen that until it was presented to you on the stand? [667]

A. No, sir.

Q. You don't know where it was from the time you left his employ until it was presented to you?

A. Not from the time I stopped, and why it was stopped I wouldn't undertake to say.

(Testimony of Julius Krakauer.)

Q. After you made the last entry, you have no recollection of seeing that?

A. I may have, but I have no definite recollection.

Mr. Campbell: That's all.

Recross Examination

Mr. Belli: Q. If you knew where this book was at the time you left Mr. Wild, you would have lifted this, too?

Mr. Campbell: I object to this question as argumentative.

Mr. Belli: Well, I can withdraw the word "lift" and say you would have taken it.

The Court: May I admonish you, Mr. Belli, on these argumentative questions.

Mr. Belli: Yes, your Honor.

Q. I notice you answered a question here that you could not answer "truthfully". Do you distinguish between your testimony on this when you use the word "truthfully"?

A. Well, what I mean—

Mr. Campbell: Let him finish his question and then let me object, Mr. Krakauer.

Have you finished your question, Mr. Belli?

Mr. Belli: Let's go on to another one.

Q. What were you doing with this system? Were you just going to warm up and see how it came out and then going to bet?

Mr. Campbell: That is objected to as immaterial.

The Court: Objection overruled.

(Testimony of Julius Krakauer.)

The Witness: A. I kept records of that kind on a lot of systems, but I never bet. Everybody that gets into this sort of thing that has a fascination for figures says that. I know a lot of fellows that do.

Q. And you kept a system on these horses that ran in the winter book? Wasn't there a system that entailed that? A. No.

Q. But even though you saw this system win and you saw other systems win, it didn't shake you to the point of playing your own money or other people's money?

A. I play horses very moderately. That is in the testimony.

Q. Did you play any system?

A. Yes, sir.

Q. Did you play this system?

A. No, sir, I stated over and over again nobody would do that.

Q. Where did you try to play this system and for how much?

Mr. Campbell: Objected to as immaterial.

The Court: Objection overruled.

A. With Mr. Coughlin on Eighth Street through his chief clerk, Jimmy Ross. [669]

Q. How much? A. \$25.

Q. You couldn't play that on \$25?

A. Oh, yes, any amount. The amount doesn't mean anything.

Q. Didn't you have to have a nut, and using "nut" in the other vernacular of around \$2,000.

(Testimony of Julius Krakauer.)

A. It only took \$2500 to bet 200 and make a nice winning, which the doctor did. So you can reduce that from 200 to 25 and you can get your proportions.

Mr. Belli: That's all.

The Court: Q. Mr. Krakauer, several questions I have in mind. A. Yes, sir.

Q. You say you made in the vernacular several small bets during the course of time?

A. Not on this system—generally?

Q. Yes. A. Yes, I did.

Q. What do you mean by several?

A. Your Honor, may I state this: I bet horses that win a third of their races so that a horse that I bet will win one in three times and if the odds are right I can make a little money.

Q. How did that run, in \$2 bets or \$5 bets?

A. It depended on the odds of the horses. [670]

Q. If the prevailing odds were favorable, you might play a \$20 bet. A. Very rarely.

Q. What would you bet average?

A. Five, probably, and I only bet at one track at a time. All of my bets were limited.

Q. Where did you place your bets during this period?

A. Through Mr. Coughlin, first, with his partner, and Mr. Bob Hughes, but that isn't the Bob Hughes that testified here—and through his chief clerk, and if I am allowed to state, I tried to find Mr. Ross last night to come up here and testify, but I didn't contact him.

(Testimony of Julius Krakauer.)

Q. You would say the majority or greater bulk of your bets were placed through Coughlin?

A. Yes.

Q. Did you keep a list of your winnings for the purpose of accounting?

A. Yes, sir, they are reflected in these bank statements that I have brought here.

Q. Did you deposit your winnings in the bank statements?

A. Everything goes through my commercial account in the Bank of America.

Q. Did you keep a little resume of your winnings, your losses as indicated, perhaps, in the same fashion as you did for the doctor? [671]

A. Yes, sir.

Q. Where is that?

A. I haven't bet a horse in over three years.

Q. Where is that list?

A. I haven't got it, sir.

Q. In preparing your income tax returns, no doubt, you had that list, did you? A. Yes.

Q. Where is it now?

A. I deposited it in the bank, sir, and kept a copy of it. I haven't got a list.

Q. Perhaps I am inarticulate, I don't know. You bet through Coughlin? A. Yes, sir.

Q. You made bets on the average of five to twenty dollars a day? A. Yes, sir.

Q. A day. Did you average \$20 a day?

A. No, sir. I don't think I would average \$20 a day.

(Testimony of Julius Krakauer.)

Q. What would your average be a day?

A. Maybe \$15.

Q. \$15 a day?

A. Yes, sir, something like that.

Q. Did that system of betting prevail all during the time you were employed by Julius Wild?

A. Very often I would follow a jockey.

Q. Then, on the average you would bet approximately \$15 a day during that period?

A. Not every day.

Q. Well, on an average—I am taking the mean average while you were employed by Julius Wild, is that correct?

A. Yes, sir.

Q. Did you keep a little book of your winnings and your losses so that at the end of a given period, say, six months or one year, you could say, “I won so much or lost so much.”

A. Yes, sir.

Q. You kept that book?

A. Yes, sir.

Q. Do you have that book now?

A. No, sir.

Q. Where is the book?

A. After I made my returns and there was no further use for it, it was just figures and I used it in making my returns and I had no further use for it. I haven't bet any horses for the last three years of any kind any place—yes, three and a half years.

Q. And I assume you never bet against your book or against Julius Wild's book?

A. No, sir. [673]

Q. That is an inviolate rule?

A. That's right.

(Testimony of Julius Krakauer.)

Q. Now, did Mr. Wild know you were betting during that period of time?

A. I did it openly, yes, sir.

Q. When you were making bets in Coughlin's?

A. Yes, sir, I did it openly, sir.

Q. One further question on this yellow sheet.

A. Yes, sir.

Q. This, as I understand it, as you informed Mr. Campbell, represents a compilation and follow through from the system established through the doctor's betting, isn't that true?

A. Yes, sir.

Q. It is really a follow through?

A. Yes, sir.

Q. In other words, there is a point of cleavage when the doctor's betting discontinued, you followed it on to find out whether or not the doctor's system would ultimately result in a loss.

A. Or stand up under time.

Q. Or stand up under time. A. Yes.

Q. And that system was, as I understand it, according to your testimony, any odds laid six to five at any tracks—

A. Six to five at any tracks—when the race was over there was a horse in there that had closed at six to five or better— [674]

Q. And the amount wagered would be \$200?

A. \$200, that's correct. It shows it right there.

Q. You say the figures at the top of the page have to do with the doctor's account?

A. They were a guide. Those were a continuation. The doctor, I think, stopped in about October or November and then I carried another sheet

(Testimony of Julius Krakauer.)

and this was—I must have filled up a sheet because the figures are carried forward. I carried it through about a year or nine months.

Q. Where did you keep the figures concerning the doctor's account? Where were they kept, in a black book, the little five cent notebook, or were they kept in the sheets or the three decks of cards?

A. They were kept first by Mr. Hughes.

Q. Where, and which Hughes?

A. The gentleman who testified.

Q. Bob Hughes?

A. Yes, sir, he was assigned to do it first and I checked him every day because it was quite important. At \$200, if you made an error in figuring the odds, that could throw you very badly off either way, and he checked me. Sometimes I would get down early and figure it and he would check me. Bob first kept them on a card he had gotten up. When I was compelled to take the job, concerning which he testified in the Alameda Court, I continued in this tablet I spoke of yesterday. [675]

Q. That is the so-called five cent tablet?

A. Yes, and when that was over, when Mr. Wild finally took his loss and stopped the doctor's bets and I continued it, there is a carry-forward item that came from another sheet and I carried it down to the bottom there.

Q. Do you know whether Mr. Callahan or Mr. Wild or you took into consideration this doctor's account in formulating the figures which finally were placed on these twelve or eleven cards?

(Testimony of Julius Krakauer.)

A. I couldn't say as to that.

Q. You wouldn't know?

A. No, sir, I don't know what Mr. Callahan took into consideration.

Q. Am I clear in stating to you that Mr. Callahan dictated to you?

A. I say that absolutely.

Q. Did he have any papers at all?

A. Not except the one that was in the typewriter that had some markings on it.

Q. Did you at any time during the course of this dictation ask Mr. Callahan, "Now, Mr. Callahan, where did you get these figures?"

A. I told Mr. Callahan himself, remember, "These figures are not in keeping with the cards in question."

Q. By "these cards" you mean 7, 8 and 9?

A. Yes, 7, 8 and 9.

Q. What did he say?

A. He said, "Just forget about those."

Q. Did you ask him whether they took into consideration the outside room as well as the inside room?

A. No, I had been asked by Mr. Wild to give Mr. Callahan this information and I was complying with my instructions.

Q. Mr. Wild told you that?

A. Mr. Wild came to me and said Mr. Callahan needed some figures to substantiate a tax return.

A. I thought you took the figures dictated by Callahan. A. What?

(Testimony of Julius Krakauer.)

Q. Didn't you tell me Callahan dictated the figures to you?

A. Mr. Wild came to me and said Mr. Callahan required some figures to substantiate a tax return; I should give them to him. Then I went over to Mr. Callahan who was at the typewriter and he dictated these figures to me.

Q. Then, in lieu of your giving figures to Callahan, as I understand your testimony, Callahan was giving figures to you?

A. When he said I was to give him figures I supposed I was to be given an opportunity to get them from the cards or somewhere. Instead, Mr. Callahan told me what to write on these cards.

Q. Did you protest at any time?

A. I told him that they were not in keeping with these cards [677] and he said to forget about them.

Q. How long did this process you have described endure; over what period of time did this mathematical operation take place, with Callahan at the typewriter and you writing on these cards? How long did it take you to write on these cards?

A. Perhaps 20 minutes.

Q. Did Callahan sit at the typewriter or make that compilation at the typewriter unaided or unassisted by you?

A. He was giving me figures to write on these 12 cards to cover one year.

Q. And where did he get those figures?

A. I wouldn't undertake to say. I have no way

(Testimony of Julius Krakauer.)

of knowing where he got those figures.

Q. Did you go to Julius Wild and protest at any time in connection with your acting as sort of a clerical arm in the operation of getting those figures on the 11 cards?

A. I did, sir, yes, sir.

Q. Were you in the employ of Mr. Wild at the time the original tax returns were filed with United States Government, and I mean by that, 1941, '42 and '43?

A. Yes, sir, I was.

Q. You were, then, his bookkeeper?

A. To the extent of those cards.

Q. Who prepared the original returns?

A. I don't know; I never saw the returns. [678]

Q. You never saw the returns?

A. No, I never.

Q. You had nothing to do with the preparation of the original returns?

A. No.

Q. It was not until Mr. Callahan came to you that any mention was ever made to you about income tax?

A. No, I think the testimony here will show that Mr. Lippert—who turns out to be Mr. Lippert, but I didn't know then was Mr. Lippert—came into the room early one morning before Mr. Wild was there and I saw him and Bob and this gentleman talking, and later on Bob came over to me and said that that was a man from the Internal Revenue and that he was questioning Jules' return. Well, I said, "Is there any question about it?" or indicated some interest in it, naturally.

(Testimony of Julius Krakauer.)

Q. You said, "Is there any question?"

A. I said, "What is the question?" and he said "It appears that is incorrect." This man showed Mr. Hughes this return and he gave me the figure, some \$2500 or something like that. That is the gross return—maybe \$3500 and I said, "I think Jules will have some explaining to do."

Mr. Belli: Will you speak a little louder, please, Mr. Krakauer?

The Court: This is out of the presence of Mr. Wild and if there is an objection it would have to be sustained. [679]

Mr. Belli: But I have not urged any objection and I do not object.

The Court: Yes, that is correct, you have not urged any objection. However, I wanted to expose these matters so we have every facet of the case.

Q. Was Mr. Wild present when you and Mr. Callahan and Mr. Lippert were there?

A. I don't know when or at what place Jules talked to Mr. Lippert if he ever did, because I was not present. The only time I ever saw Mr. Lippert was when he talked to Mr. Hughes.

Q. Did you assume to indicate to this Court and jury that the three sets of cards, 7, 8 and 9, purport to represent the full, complete exposition of the operation of that bookmaking establishment during the years in question?

A. Only as to what was going on in the front room. I couldn't say otherwise.

Q. Now, at the time you had this discussion

(Testimony of Julius Krakauer.)

with Mr. Callahan and at that time he was at the typewriter, was there any discussion at that time between you and Callahan or Wild or Lippert with respect to the operation of the back room?

A. No, sir, there was none whatsoever except as I have stated, that I was asked to give Mr. Callahan these figures and I did so, sir.

Q. Mr. Callahan is perfectly able to write, is he not, in the sense that he can write, spell and read? [680] A. Right.

Q. There is no question about that?

A. There is no question about that.

Q. You tell me now your sole province was to take down in writing on these 11 cards and transcribe information which Callahan read out to you?

A. Yes, sir.

Q. And that was your sole and exclusive province? In other words, you just took the figures he read to you?

A. That is all he did with reference to them. They wanted the cards in my handwriting, and of course, because it had to be in somebody else's handwriting, and Mr. Callahan had probably made the remark.

Q. Why did they have to be in your handwriting? A. That is an assumption on my part.

Q. Callahan sent the returns in?

A. Yes.

Q. Why did they have to be in your handwriting? Is that an assumption on your part?

A. That is an assumption on my part, but I know they were in my handwriting.

(Testimony of Julius Krakauer.)

Q. When you said a moment ago, Mr. Wild told you to give figures to Mr. Callahan, is that correct or is that incorrect? A. That's correct.

Q. Did he tell you the kind of figures to give to Mr. Callahan? [681]

A. No, just figures.

Q. Did you in fact give figures to Mr. Callahan?

A. No, he gave them to me.

Q. Where did he get them?

A. From the paper on the typewriter, as far as I know.

Q. And the whole business lasted how long?

A. Twenty minutes—maybe not that long.

The Court: That's all I have.

Recross Examination

Mr. Belli: Q. During the twenty minutes there must have been some conversation between you and Mr. Callahan?

A. No, he gave me the first figures and then he would hesitate a while and then give me the second.

Q. You have a mental picture of hesitation. When he hesitated, was he typing?

A. No, he wasn't.

Q. Why did he hesitate?

Mr. Campbell: I object to that.

The Court: I think we are entitled to have a full exposition of what transpired between Mr. Callahan and this witness. Serious charges are being made and I think we should have a complete exposition. There are repercussions that come out of this matter that concern the Court. I am not

(Testimony of Julius Krakauer.)

concerned with hypertechnicalities. I want a complete disclosure.

Mr. Campbell: I agree with the Court. [682]

Mr. Belli: Let me do it then.

Mr. Campbell: But I am not concerned with any inferences and assumptions, if the Court please, but only with the facts.

The Court: In fairness to the prosecution, this gentleman has given me several assumptions when I asked him questions, isn't that true?

The Witness: Yes, sir.

Mr. Campbell: That probably is true, your Honor.

The Witness: And I stated them as assumptions, if your Honor will remember.

The Court: I want the facts; the Government wants the facts; the defense wants the facts.

Mr. Belli: Q. Let me start with this this way, Mr. Krakauer: It is a truism that there is no way we can reconstruct the past with moving pictures or anything else. The only think we have to rely on in this case is your memory; and you have in your mind's eye a picture, as you reflect back and think to yourself, and you see Mr. Callahan, apparently.

Mr. Campbell: Just a moment. I object to the argumentative form or exposition by counsel.

The Court: I will sustain the objection.

Q. You recall the scene pretty vividly?

A. Yes, sir.

(Testimony of Julius Krakauer.)

Q. Now, recalling the scene vividly will you answer the questions? [683] A. Yes, sir.

Mr. Belli: Q. You recall the scene vividly and you recall it was twenty minutes or so?

A. That I think is about correct.

Q. Now, Mr. Callahan had all the figures written on a piece of paper on the typewriter and you came to him, is that right?

A. I don't remember the figures from the paper, whether the figures he dictated to me were on the typewriter or not—I don't know that.

Q. How close did you sit to Mr. Callahan?

A. We were both standing right there. I was to the side of him.

Q. He was not seated at the typewriter?

A. No, you had to stand to write at that typewriter. The counter was too high.

Q. Were you touching elbows, perhaps?

A. I don't remember as to that.

Q. How close were you?

A. Standing side by side.

Q. Standing two feet apart? A. Maybe.

Q. Standing two feet apart, now, do you recall in that 20 minutes whether Mr. Callahan had any other records there?

A. He may have had some records, writing on the other side. He usually carried a briefcase.

Q. Did he or did he not have the briefcase?

A. Well, yes, he did, I presume it was over on the other side.

(Testimony of Julius Krakauer.)

Q. Well, do you remember whether he did that day or not? A. Not positively.

Q. Did you see him take anything out of this briefcase? A. Not while I was there.

Q. Did he touch the keys of the typewriter at all during the 20 minutes? A. He did not.

Q. Was there any appreciable period of time after you would write down on the card before he would, as you say, dictate the figures?

A. There was some lapse of time.

Q. During the lapse of time, what was there, silence?

A. I would just wait for him to give me the next figure.

Q. What was he doing?

A. I don't know; he was thinking, I guess. He was not handling the papers, I can say.

Q. He had the paper in front of him on the typewriter with the figures?

A. But I don't know whether he was making or whether he was giving them from that or not.

Q. Standing two feet away from him?

A. I couldn't have read two feet away with my eyes.

Q. Do you say because your poor vision maybe you couldn't [685] have seen what he was reading from?

A. That might be true. And I couldn't do it now, and I am older too, and I have worn glasses since I was a small child.

Q. Another subject, Mr. Krakauer: At least it

(Testimony of Julius Krakauer.)

was in 1941 that you destroyed these papers you had reference to bets, didn't you? A. 1941?

Q. Yes, or was it 1942?

A. I have always made my return each year. After that they were of no use to me. I only keep my bank records and cancelled checks.

Q. In 1941 and 1942 you destroyed records of your own? A. Yes, sir.

Q. Didn't you tell us a moment ago, Mr. Krakauer, that the reason that you were taking care of these cards here was because you thought you would need them, that you were in a tax jam?

Mr. Campbell: I am sorry, but I can't hear you, Mr. Belli.

Mr. Belli: Well, let's have the Reporter read it.

(Question read.)

Mr. Belli: Q. Is that right?

A. No, sir, in a tax jam personally?

Q. Well, your motive in taking these cards, as you testified, as to protect yourself if Julius were to take you to the Government? [686]

A. Based on the statement of his not to do him any harm in this matter, because I was in it as deep as he was, and not being a tax expert I assumed there might be some reason for it.

Q. And while you were taking Julius' cards from his business, you were tearing up your own, is that right?

A. No, I only destroyed them when they were of no further use for tax purposes.

(Testimony of Julius Krakauer.)

Q. You bet in 1943, didn't you?

A. Yes.

Q. You threw those cards away, didn't you?

A. Yes.

Q. How did you think it would help you by taking Julius' cards and tearing up your own, Mr. Krakauer?

A. I didn't know what action might be taken on the papers.

Q. Weren't you the one that advised Julius as you told us from the stand the other day, that he better have records and keep all his cards?

A. I didn't do that. I think Mr. Callahan did, however, but I **didn't**.

Q. By the way, your average of betting there was about \$5 more than what you were making. Weren't you making \$10 a day?

A. Yes, but I was not betting every day.

Q. But you averaged, as you told us, \$15 a day?

A. Yes.

Q. And you were not working every day, were you? [687]

A. When I was working for Mr. Wild, I was.

Q. And besides betting \$5 a day more than you made, you were able during the period to loan Julius some \$7,000, is that right?

A. On only one occasion, to help him out on the Sea Biscuit loss.

Mr. Belli: That's all, Mr. Krakauer.

(Testimony of Julius Krakauer.)

Redirect Examination

Mr. Campbell: Q. Just one question that I overlooked, Mr. Krakauer: How much did Julius Wild owe you, to the best of your recollection, on January 1, 1941?

A. Probably around \$3500—maybe \$3000. That is very hard for me to say.

Q. Would your best recollection be it was at least \$3000?

A. I believe so. At no time did he owe me over \$5000 except on the occasion of this \$7000 loan.

Q. Well, is it your best recollection that it is \$3000? A. Yes.

Mr. Campbell: That's all.

Recross Examination

Mr. Belli: Q. You told us the other day, Mr. Krakauer, that you didn't know. Do you recall your testimony given the other day when you were under oath in this Court here that you said you didn't know?

A. My best recollection now is \$3000 and that is very hard to [688] say, and I repeat that is very hard to say.

Q. Well, if you didn't know the other day or jogged your memory to jump it up to \$3000, just because it is Thursday—is that what you did?

A. It might be \$2500 or it might be \$3000. That is my best recollection. That is all.

Mr. Belli: All right. That's all.

(Testimony of Julius Krakauer.)

Mr. Campbell: Q. That is your best recollection—\$3000? A. Yes.

Mr. Campbell: That's all.

EMMA WILD,

recalled as a witness on behalf of defendant; previously sworn.

Further Direct Examination

Mr. Belli: Q. With reference to this book, the exhibit by the defendant, Exhibit O, and what has been referred to as the cash book, were you the one that found this book?

A. Yes, Mr. Belli.

Q. Where and when did you find it?

A. I found it—when the book was closed permanently after they declared—

Q. By the "book" you mean Mr. Wild's business?

A. I mean Mr. Wild's business, and all the furnishings and everything was put in the far corner of the basement at 1182 Market Street, his place of business. They were there in storage for quite some time and then finally Mr. Harper—you see, the Government took that building over and they had to put offices in the basement. He had his offices down there and a beauty parlor and other places. So Mr. Harper called and said they needed the

(Testimony of Emma Wild.)

space where all these furnishings and tables and so forth were, so I hired—

Q. Well, you got a moving company and you had them moved? A. Yes.

Q. Did you look with the Government representatives for any other books?

A. Well, after finding that—let me get to my story. You [690] know Julius had a lot of pictures over the wall. If he had one he must have had a couple of hundred.

Q. All horse pictures, I presume?

A. Yes, and they were put in big cartons and I know that was his hobby, and there were so many fine pictures that I had the drayman ship them down to my home in Redwood City, and they were just stored. We have rafters, and they were stored up in the rafters.

Q. Well, you are keeping us all in suspense. Will you bring us to the time when you and the Government looked for the books? A. Yes.

Q. Did you find any?

A. No, but I didn't look through these pictures up above on this rafter, and here about two months ago I found that book, and I went to clean out the garage, and I looked through everything, and that book was among some of those pictures, and it was sort of stuck into the side.

Mr. Belli: That's all; you may cross-examine.

Mr. Campbell: No questions.

JULIUS WILD,

recalled as a witness in his own behalf; previously sworn.

Further Direct Examination

Mr. Belli: Q. You recognize this book, Defendant's Exhibit O, called the cash book?

A. Yes.

Q. That writing in there is Mr. Krakauer's, isn't it? [691]

A. Every figure in these books is Mr. Krakauer's.

Q. Do you know whether he was keeping other books besides these cards?

A. Mr. Krakauer kept four or five books everywhere.

Q. Did he do a lot of betting on the side?

A. A lot of betting? One day alone he lost \$300 and reached in and said, "Jules, I need some money." He went to bet with Coughlin and used to bet through the runners, like Frank Kaiser.

Q. When was it the horses took Mr. Krakauer for \$300?

A. That system comes up so often and you have to keep following it. You needed that much to keep going through.

Q. Did you take a chance on the system?

A. Did I take a chance on the system?

Q. Yes. A. Yes.

Q. You tried it, yourself?

A. I tried it for two or three or four thousand dollars worth.

(Testimony of Julius Wild.)

Q. I don't mean with Dr. Shornick, but did you try and place a bet with some other bookie?

A. No.

Mr. Belli: That's all. Any questions, gentlemen?

Mr. Campbell: No questions.

Mr. Belli: Defendant rests, your Honor.

(Defendant rests.)

[692]

WILLIAM BURKETT,

recalled as a witness in behalf of the Government in rebuttal; previously sworn.

Direct Examination

Mr. Campbell: Q. Mr. Burkett, you have heretofore been identified as the agent of the Intelligence Unit in charge of the investigation of this case.

A. Yes, sir.

Q. Now, during the course of that investigation did you interview the wife of Julius Wild, Emma Wild, I believe is her name?

A. Yes, sir.

Q. Who appeared here on the stand?

A. Yes.

Q. Did you attempt to ascertain what assets, if any, either Julius Wild or Emma Wild had as of January 1, 1941?

A. We went into that quite carefully.

Q. Did you do that with Mrs. Wild?

A. Yes.

Q. When did you interview Mrs. Wild?

A. According to my notes, it was—the original notes are dated December 16, 1946, and are entitled, "Interview with Mrs. Wild at office."

(Testimony of William Burkett.)

Q. Is that the date on which you interviewed Mrs. Wild? A. Yes, sir. [693]

Q. Did you at that time question her as to any cash or money which may have been on hand, either in her possession or in her control or in the possession and control of Julius Wild? A. Yes.

Q. Will you state what she told you in that regard as to cash?

A. Referring to my notes again, she stated that the property in Larkspur at 127 Locust, a house and lot—

Q. I am asking you about cash.

A. No, the only cash she had was what she had in the bank account at Larkspur.

Q. Was that question specific as to the date that she had any cash in the bank, in the savings account at Larkspur?

A. Yes, we covered from the time she went to Larkspur up to the present time, as of the date of that interview. At each stage I wanted to know the bank accounts she had and the name of the bank, and whether it was in her name, and with Julius, or alone.

Q. And it also covered the period of January, 1941?

A. Yes, I had the returns clear back to 1933 before me.

Q. Did you ask her specifically as to cash other than cash in bank accounts? A. Yes.

Q. What did she tell you?

A. She said none other than that reflected in the bank accounts.

(Testimony of William Burkett.)

Q. At any time during the investigation did Mrs. Wild or Mr. [694] Wild, or anyone else, ever tell you anything about \$20,000 in a safe deposit box, or in a home? A. No, sir.

Q. When was the first time you heard about a \$20,000?

A. When Mrs. Wild stated it on the stand yesterday was the first time I ever heard about a \$20,000.

Q. Or any other sum which was kept in the home? A. That's right, sir.

Q. There has been some testimony here by Mr. Hughes, who appeared on behalf of defendant, his attention having been called to his statement under oath where he stated that the only records he had to show were the cards, Government's Exhibits 7, 8 and 9—

Mr. Belli: Just a minute, that is not the testimony. I resent a misstatement of the testimony.

Mr. Campbell: Very well, I will reframe the question.

Q. I call your attention to the testimony of Mr. Hughes, and in fact I will refer to the record—

Mr. Belli: I might, Counsel, to save time, state that it is objectionable for counsel to ask him to comment on a summary of another witness' testimony.

Mr. Campbell: I will ask my questions, Mr. Belli, and you can make your objection.

Mr. Belli: Thank you.

Mr. Campbell: Q. Your attention is directed to testimony [695] given here by Mr. Hughes, wherein Mr. Hughes' attention was directed to a statement given by him prior to his appearance on

(Testimony of William Burkett.)

the stand, and which statement was under oath, wherein he gave the following answer to the following question:

“Q. Were any bookkeeping records of any kind kept of the race horse bookmaking business of Mr. Wild?

“A. The only records were small cards.”

In Mr. Hughes’ testimony, in explaining that answer, he stated that he had also advised you, Mr. Burkett, that there was a black book. Did Mr. Hughes at any time you interviewed him ever advise you concerning the existence of a black book or other account book other than the cards, Government’s Exhibits 7, 8, and 9?

Mr. Belli: Just a minute, that is objected to as leading and suggestive, and compound, and argumentative, and asking him to comment on the testimony of another witness; and furthermore, it is not proper redirect examination.

The Court: Objection overruled.

The Witness: A. Mr. Hughes was under oath—

Mr. Belli: Just a minute, that is the vice of this, and that is why I objected.

The Witness: Could I have the question again?

Mr. Campbell: Q. The question was, did Mr. Hughes, during any interviews you may have had with him, mention the existence of any black book or any book other than the cards, Exhibits [696] 7, 8, and 9?

A. No, he never mentioned there was a black book of any kind or a book.

Mr. Campbell: That’s all.

(Testimony of William Burkett.)

Cross Examination

Mr. Belli: Q. He was not asked with reference to a black book, was he, Mr. Witness?

A. I asked Mr. Hughes under oath what records were kept and he pointed to the cards on the table and said, as I recall it, "Those are the only cards that Mr. Wild has—records."

Q. Everything that was said in that interview was written down here, isn't it? A. Yes.

Q. Are you positive?

A. Well, there was one thing Mr. Hughes wanted to keep off of the record.

Q. Then don't say what it is, and I don't want it if it is going to be another prejudicial statement.

A. You can have it if you want it.

Q. No, I don't want any more prejudicial statements.

Mr. Campbell: Just a minute, let us not get argumentative. He did not volunteer the statement.

Mr. Belli: But he would like to.

Q. With reference to Mr. Wild's cash, she told you there was a safe deposit box over in Fairfax, or San Anselmo some place? [697]

A. Larkspur, and I went to the bank to verify it.

Q. And there was, wasn't there?

A. In 1937 and 1938. She didn't have—

Q. When did the bank close?

Mr. Campbell: Just a minute, let him finish his

(Testimony of William Burkett.)

answer. Will you read his answer as far as he got, Mr. Reporter?

(Record read.)

Mr. Campbell: Q. Did you finish the answer?

Mr. Belli: Q. Go ahead.

The Witness: A. The record of the American Trust Company, Larkspur accounts are before me. The commercial account was opened in 1933, April 19, and closed November 3, 1933, and the sum amount of money deposited—opened with \$300 and closed with \$45, and the total amount deposited was \$466.02 during that period in 1933. The amount withdrawn was on November 3, 1933.

Q. We are not talking about that. We are talking about the safe deposit box.

A. Yes, there was one for 1937 or 1938, and that was not under investigation, and we have no access to that box.

Q. You did not ask her anything about it?

A. I asked her, because I wanted—

Mr. Campbell: Not because, just what you asked her.

The Witness: A. I asked her if she had any cash anywhere, any place, other than in a bank, and she said, no, the only [698] thing she had was as reflected in the bank account. So I went to the bank and found they had nothing to do with the years in question and they were very minor accounts.

Q. Let us take only the safe deposit. Did you ask

(Testimony of William Burkett.)

her what was in the safe deposit box during those years?

A. I asked her if there was any cash.

Q. Are you positive?

A. Any bonds, securities, jewelry, anything of value.

Q. Are you positive you asked her?

A. Yes, I did.

Q. Didn't you just say you were not interested because she was not under investigation for those years?

A. But the point there is that there might be some securities, stocks and bonds, that might have some dividends that would come in in 1943, 1944.

Q. Did you ask her to go through the box?

A. Did I?

Q. She had a box in San Francisco, didn't she?

A. There was no record I can find in 1941 to 1943 that she had a box, but Julius had a box to go in and out for silver money in which his employees had access to.

Q. Is that a box that both he and Mrs. Wild had access to?

A. No, that was for Julius and a man named Collard for this nut that they started off each day with.

Q. You went down to Redwood City to look for the black book, [699] didn't you?

A. No, I never went to Redwood City. At that time Julius was calling it one green book in a green desk.

(Testimony of William Burkett.)

Q. The green desk?

A. So we had to find it. There was one book and it was green at that time.

Q. Before the trial began, at least, you went some place looking for other records, didn't you?

A. I told Mr. Wild if there were any other records we would be glad to look at them. We went even to his storage place and to his office and tried to give the man the benefit of the doubt, if there was any doubt.

Mr. Campbell: Just a minute, Mr. Burkett.

Mr. Belli: I am going to assign these remarks of this witness as misconduct.

The Court: The only objectionable portion of the answer was "trying to give the man the benefit of the doubt, if there was any doubt," and that may go out and the jury are instructed to disregard that.

Mr. Belli: Q. Julius told you that Mr. Hughes told you long before he had even had counsel, or, as he put it, a mouthpiece, that there were other books besides these records?

A. Mr. Hughes said those were the only records and he kept the top part of it.

Q. Mr. Wild said there were other records?

A. Mr. Wild said there was a green book and I asked him to produce it and he was not able.

Q. How many records did Mr. Krakauer tell you there were?

A. He said those were the only records.

(Testimony of William Burkett.)

Q. Let us put it this way so there won't be any confusion about it.

The Court: That is another year; that is 1940.

Q. I didn't ask you about that year.

A. I am sorry.

Q. That's all right. He told you these were the only records, Mr. Krakauer? A. Yes.

Q. And you believed him and you did not believe Julius? A. Well—

Mr. Campbell: That's objected to.

Mr. Belli: Withdraw the question. That's all.

Mr. Campbell: That's all.

SAMUEL ZEMAN

recalled as a witness on behalf of the Government in rebuttal; previously sworn

Mr. Campbell: Do you wish the man from Maxferd's recalled, or will you stipulate to this thousand dollars?

Mr. Belli: You better call him.

Mr. Campbell: Q. Mr. Zeeman, you testified here the other [701] day as of January 1, 1941, that there was a balance due from Julius Wild to the firm you represent of Maxferd's of \$1000. Since that time, or yesterday, there was some question raised concerning the accuracy of that statement. Will you now state if you have re-examined your records, and what they disclose as to the liability of Julius Wild to your firm as of January 1, 1941?

A. Yes, sir, the other card was self-explanatory and said it was taken—if I may see the last card. It says that he owed it in 1941.

(Testimony of Samuel Zeman.)

Q. I am referring to Defendant's Exhibit H. You have found the additional card, have you?

A. Since then, yes, but on that card—

Q. And you have produced a card bearing the date of February 12?

A. That is the date of the loan.

Q. Bearing the date of February 12, and March 16, 1941, it was paid, is that correct?

A. Yes, that's right.

Q. Will you examine that, sir, and these other records, if you wish, and state what amount, if any, Julius Wild owed you, Maxferd's, on January 1, 1941? A. On January 1, 1941, he owed \$1000.

Q. Right. Now, as of December 31, 1943, did he owe you any money? [702] A. December, 1943?

Q. December 31st—on that day.

A. Yes—none.

Q. None is right. You have produced an additional card of your records?

A. Yes, it was a 1941, and it was put away seven or eight years, and I had to look for it.

Mr. Campbell: I ask it be incorporated with Exhibit H.

Mr. Belli: We stipulate.

The Court: So ordered. These records are to be returned to this witness' office?

Mr. Campbell: Yes.

The Court: The Government will have photo-stats made?

(Testimony of Samuel Zeman.)

Mr. Campbell: Yes. That's all.

Cross Examination

Mr. Belli: Q. As I understood your testimony the other day, so I will have this clear, Mr. Bougher was going over some figures with you and you told him you were in error or that part.

A. He didn't owe \$1000, according to the other card.

Q. Now, you found out he did?

A. Yes, it was over eight years, and it took me considerable time to find it, but according to this he did owe \$1000.

Mr. Belli: That's all. [703]

Mr. Campbell: That's all.

As to the balances in the American Trust Company, Civic Center Branch, do you desire me to produce the man form that bank on the stand, or will it be stipulated as to the balance, as I believe it has been previously stipulated?

Mr. Belli: What is it?

Mr. Campbell: Will it be stipulated that the balance in the American Trust Company, Civic Center Branch, Commercial Account, January 1, 1941, was \$142.75, and that the balance as of December 31, 1943, was \$2108.82?

Mr. Belli: We will stipulate to that.

Mr. McMillan: At this time, may it please your Honor, the Government rests.

(Government rests.)

The Court: May the record now show that the defendant's rests?

Mr. Belli: Yes, your Honor, the defense rests.

Defendant Rests

(Thereupon following the usual admonition, the jury was excused until 2:00 o'clock p.m., at which time the arguments of counsel were made.)

[704]

CERTIFICATE OF REPORTER

We, Official Reporters and Official Reporters pro tem, certify that the forgoing transcript of pages is a true and correct transcript of the matter therein contained as reported by us and thereafter reduced to typewriting, to the best of our ability.

/s/ F. J. SHERRY,

/s/ ELDON N. RICH.

[Endorsed]: Filed Sept. 30, 1948.

[Endorsed]: No. 12053. United States Court of Appeals for the Ninth Circuit. Julius Wild, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed October 26, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 12054

United States
Court of Appeals
for the Ninth Circuit

PACIFIC PORTLAND CEMENT COMPANY,
a corporation,

Appellant,

VS.

WESTVACO CHLORINE PRODUCTS COR-
PORATION, a corporation,

Appellee.

Transcript of Record

(In Three Volumes)

VOLUME I

(Pages 1 to 456, inclusive)

Appeal from the United States District Court
for the Northern District of California,
Southern Division

FEB 16 1949

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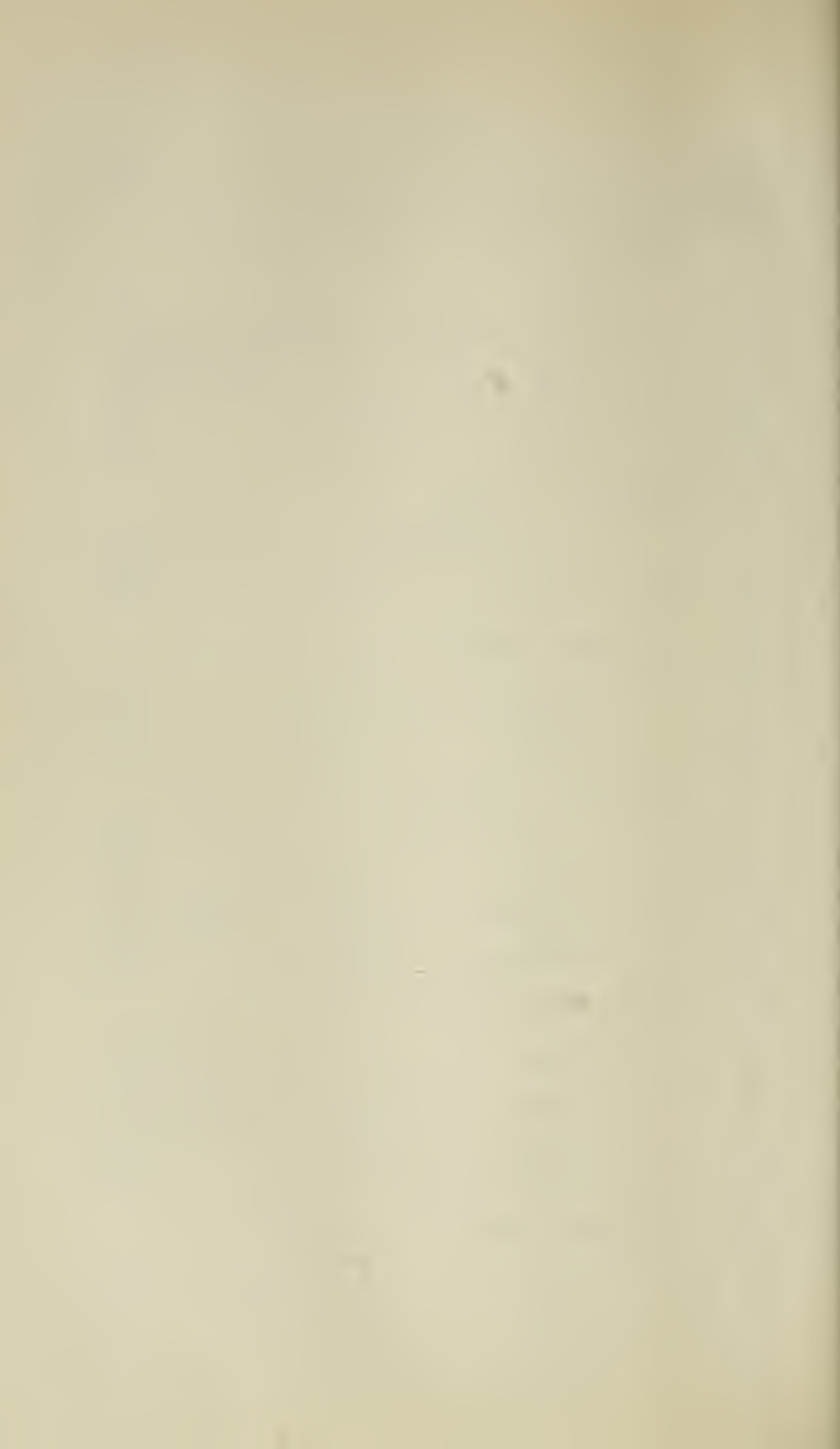
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In the District Court of the United States for the
Northern District of California, Southern Division

Civil No. 26934-R

PACIFIC PORTLAND CEMENT COMPANY,
a California Corporation,

Plaintiff,

vs.

WESTVACO CHLORINE PRODUCTS CORPORATION, a Corporation,

Defendant.

COMPLAINT FOR DECLARATORY AND
OTHER RELIEF

Plaintiff above named complains of defendant and alleges:

1. Plaintiff is and at all times herein mentioned was a corporation organized and existing under the laws of the State of California. [1*]

2. Defendant is and at all times herein mentioned was a corporation organized and existing under the laws of the State of Delaware, and qualified under the laws of the State of California to do business therein, and has designated an agent in the City and County of San Francisco and within this district upon whom process may be served herein.

3. The value of the matter involved in this suit is in excess of the sum of \$3,000, exclusive of interest and costs, and because of the diversity of citizenship between plaintiff and defendant, plain-

* Page numbering appearing at foot of page of original certified Transcript of Record.

tiff has elected to commence this action in the District Court of the United States for the Northern District of California, Southern Division.

4. On or about the 29th day of January, 1937, plaintiff entered into a written contract with California Chemical Company, a corporation. A true copy of said contract is attached hereto marked "Exhibit A," and by this reference is incorporated herein. In or about the month of March, 1937, defendant, with plaintiff's written consent, succeeded to all the rights and obligations under said agreement of said California Chemical Company.

5. A controversy has existed and does now exist between defendant and plaintiff as to the provisions of the aforementioned contract and the rights and obligations of the parties thereunder, to the extent and in the manner hereinafter alleged.

6. In August, 1941, defendant notified plaintiff that, effective October 5, 1941, the price of gypsum was increased under paragraph (6) of said contract to \$2.98 per ton, by reason of an alleged increase of 18 cents per ton in defendant's cost of production of gypsum. Plaintiff was and [2] is without knowledge whether defendant's cost of production of gypsum actually had so increased; nevertheless, commencing October 5, 1941, paid defendant \$2.98 per ton for gypsum delivered under said contract.

7. On or about January 14, 1944, defendant notified plaintiff that, effective March 15, 1944, the price of gypsum would be increased under para-

graph (6) of said contract to \$3.76 per ton, by reason of a further alleged increase of 78 cents per ton in defendant's cost of production of gypsum.

On information and belief plaintiff alleges that if defendant's cost of production of gypsum had further increased at all it had so increased not more than 29 cents per ton, and that pursuant to paragraph (6) of said contract defendant was entitled to be paid not more than \$3.27 per ton for gypsum delivered under said contract on and after March 15, 1944. Plaintiff protested said purported increase to \$3.76 per ton and under such protest paid defendant \$3.76 per ton for gypsum delivered under said contract from September 4, 1946, to and including November 12, 1946. On information and belief, plaintiff alleges that said payments were in excess of the price properly chargeable by defendant under said contract by not less than 49 cents per ton, or a total sum of not less than \$2,494.59.

8. On or about September 13, 1946, defendant notified plaintiff that, effective November 13, 1946, the price of gypsum was increased under paragraph (6) of said contract to \$4.48 per ton, by reason of an alleged additional increase of 72 cents per ton in defendant's cost of production of gypsum.

On information and belief plaintiff alleges that if defendant's cost of production of gypsum had increased at all [3] it had increased not more than an additional 25 cents per ton, and that pursuant to paragraph (6) of said contract defendant was

entitled to be paid not more than \$3.52 per ton for gypsum delivered under said contract on and after November 13, 1946. Plaintiff protested said purported increase to \$4.48 per ton and under such protest paid defendant \$4.48 per ton for gypsum delivered under said contract from November 13, 1946, to and including January 31, 1947. On information and belief plaintiff alleges that said payments were in excess of the price properly chargeable by defendant under said contract by not less than 96 cents per ton, or a total sum of not less than \$6,911.34.

9. Plaintiff alleges on information and belief that defendant has erroneously construed the term "cost of production" as used in paragraph (6) of said contract and continues to do so, and defendant has erroneously, and through the use of improper accounting and other methods, determined its cost of production of gypsum. Plaintiff further alleges that in violation of said contract defendant has refused plaintiff access to defendant's books of account and records showing its production cost of gypsum.

For a Second, Separate and Distinct cause of action against defendant plaintiff alleges:

1. Plaintiff repeats and incorporates herein the allegations contained in paragraphs 1 to 5, inclusive, of plaintiff's first cause of action.

2. Pursuant to paragraph (5) of said contract plaintiff has from time to time made deductions from the price of gypsum sold to plaintiff thereunder, by reason of the failure of various lots of

said gypsum to conform within 2 per cent in gypsum content to the chemical analysis and specifications set [4] forth in said contract. Defendant has asserted and now asserts that deductions so made by plaintiff in the total amount of \$8,985.02 were not authorized by paragraph (5) of said contract and defendant has demanded that plaintiff pay said sum of \$8,985.02 to defendant. Plaintiff alleges that said assertions by defendant are erroneous.

For a Third, Separate and Distinct cause of action against defendant plaintiff alleges:

1. Plaintiff repeats and incorporates herein the allegations contained in paragraphs 1 to 5, inclusive, of plaintiff's first cause of action.

2. On or about October 6, 1946, defendant notified plaintiff under paragraph (3) of said contract that defendant intends to produce in excess of 20,000 tons of gypsum in the calendar year 1947. Plaintiff did not elect under said paragraph (3) to refuse to purchase and accept the excess and therefore gave defendant no notice of refusal. Defendant now claims that, by waiving its right to refuse to purchase and accept such excess over 20,000 tons in the calendar year 1947, plaintiff also waived its right to refuse to purchase and accept in excess of 2,000 tons of gypsum in any one month in 1947. Plaintiff claims that its right to refuse to purchase and accept in excess of 2,000 tons in any one month is separate and distinct from its right to refuse to purchase and accept in excess of 20,000 tons in any one calendar year, and that plaintiff still has the right to refuse to purchase and

accept in excess of 2,000 tons of gypsum in any one month in 1947.

Wherefore, plaintiff prays judgment against defendant as follows:

1. That the court declare the rights and other legal [5] relations of the plaintiff and the defendant created by the aforesaid contract dated January 29, 1937, and in particular that the court (a) construe the term "cost of production" as used in paragraph (6) of said contract and declare the proper method of determining such cost of production; (b) declare that the deductions made by plaintiff from the price of gypsum by reason of its failure to conform to the required specifications, were proper, and declare the proper method of determining the conformity or nonconformity of gypsum to said specifications; and (c) declare that plaintiff's rights of refusal under paragraph (3) of said contract are separate and distinct.

2. That plaintiff have judgment against defendant for the sum of nine thousand four hundred five and ninety-three hundredths dollars (\$9,405.93), and for plaintiff's costs and disbursements herein.

3. That plaintiff have such other and further relief as to this court may seem meet and proper in the premises.

/s/ PILLSBURY, MADISON &
SUTRO,

/s/ EUGENE D. BENNETT,
/s/ MAURICE D. L. FULLER,
/s/ WALLACE L. KAAPCKE,
Attorneys for Plaintiff. [6]

EXHIBIT A
AGREEMENT

This Agreement, made this 29th day of January, 1937, by and between Pacific Portland Cement Company, a California corporation, hereinafter called "Pacific," a party of the first part, and California Chemical Company, a Delaware corporation, hereinafter called "California," party of the second part,

Witnesseth:

Whereas California contemplates the erection of a plant located on Canal Head at Newark, California, primarily designed to produce magnesium oxide in its various forms, which plant will produce as a by-product substantial quantities of gypsum, and

Whereas Pacific is desirous of purchasing from California certain of the gypsum produced at said plant;

Now, Therefore, the parties hereto, in consideration of the mutual promises and covenants herein contained, promise and agree as follows, to wit:

(1) California agrees that it will sell and deliver to Pacific, and Pacific agrees that it will purchase and receive from California, the entire output of by-product gypsum produced by California at its said plant in excess of California's requirements for use or sale of gypsum for chemical, pharmaceutical, or scientific purposes, which requirements of California shall not exceed four thousand (4,000)

tons per annum. It is the intent of this agreement that Pacific will purchase from California, and California will sell to Pacific, all gypsum produced at said plant which may be available for any use for agricultural, building, or construction purposes, or any other commercial purpose other than for chemical, pharmaceutical or scientific purposes.

(2) This agreement shall apply to all gypsum produced at said plant up to January 31, 1962; provided, however, that at any [7] time during the first two (2) years of this agreement, upon the giving of written notice by Pacific to California, this agreement may be cancelled by Pacific, and that at any time after the first two (2) years Pacific may cancel this agreement on the giving of one year's written notice to California.

(3) Pacific agrees that it will purchase and accept shipments of gypsum so produced in approximately equal monthly quantities. California agrees that on or before the fifteenth day of each month it will notify Pacific in writing of the amount of gypsum which it proposes to produce during the succeeding calendar month, and Pacific shall have the right to refuse to purchase and accept in excess of two thousand (2,000) tons in any one month, such refusal to be exercised in writing on or before the first day of the calendar month during which gypsum in excess of two thousand (2,000) tons per month is to be produced.

California further agrees that it shall give Pa-

cific three (3) months' notice in writing of its intention to produce in excess of twenty thousand (20,000) tons of gypsum in any one calendar year, and Pacific shall have the right to refuse to purchase and accept in excess of twenty thousand (20,000) tons in any one calendar year, such refusal to be exercised in writing within thirty (30) days after receipt of notice from California.

In the event that Pacific shall exercise its right to refuse to purchase and accept in excess of two thousand (2,000) tons in any one month, or twenty thousand (20,000) tons in any one year, then and in that event California shall have the right to sell the amount so refused for any purpose whatsoever.

(4) Pacific shall pay California for said gypsum two and eighty hundredths dollars (\$2.80) per net ton of two thousand (2,000) pounds loaded bulk on board cars at the plant of California at Newark, California. Payments shall be made on the fifteenth day of the month for gypsum loaded during the preceding month. [8]

(5) In the event that any gypsum ($\text{CaSO}_4 \cdot 2\text{H}_2\text{O}$) tendered to Pacific hereunder shall not be within two per cent (2%) in gypsum ($\text{CaSO}_4 \cdot 2\text{H}_2\text{O}$) content of, or if it shall not conform to, the chemical analysis and specification attached hereto, marked Exhibit "A," and hereby made a part hereof, then and in that event Pacific shall have the option as to any such gypsum ($\text{CaSO}_4 \cdot 2\text{H}_2\text{O}$) either to (1) refuse to accept and pay for such gypsum ($\text{CaSO}_4 \cdot 2\text{H}_2\text{O}$), or (2) accept such gypsum

($\text{CaSO}_4 \cdot 2\text{H}_2\text{O}$) and pay therefor ten cents (10c) per ton less than the price provided for in paragraph (4) above for each per cent which the said gypsum ($\text{CaSO}_4 \cdot 2\text{H}_2\text{O}$) falls below the said chemical analysis in gypsum ($\text{CaSO}_4 \cdot 2\text{H}_2\text{O}$) content.

(6) In the event that California's cost of production of gypsum for any twelve (12) months' period during the term hereof shall increase five per cent (5%) above its average cost of production of gypsum for the preceding twelve (12) months' period, then and in that event California shall have the right, upon giving sixty (60) days' written notice to Pacific, to increase the price payable hereunder for gypsum thereafter delivered hereunder in an amount not to exceed the "actual advance in California's cost of manufacture"; provided that in no event may more than one such increase be made in any one calendar year.

California shall keep books of account and records showing its production cost of gypsum, and such books of account and records relating to the production cost of gypsum shall be open to inspection to Pacific at all reasonable times in order to enable Pacific to confirm the correctness of any advance in price permissible under this paragraph.

(7) All new or additional state or federal taxes levied subsequent to the date hereof on the sales covered by this agreement shall be added by California to the sales price and paid to California by Pacific. [9]

(8) This agreement shall bind and inure in

favor of the parties hereto, their respective successors and assigns. California is hereby given the express right to assign this agreement to any corporation of equal financial responsibility with California, or which may operate the plant contemplated to be operated hereunder, with substantially the same properties and plant; otherwise California shall have no right to assign this agreement or any of its rights or obligations hereunder without the written consent of Pacific.

In Witness Whereof, the parties hereto have caused these presents to be executed as of the day and year first hereinabove written.

PACIFIC PORTLAND

CEMENT COMPANY,

By /s/ ROBT. B. HENDERSON,

President.

/s/ A. H. CANVIN,

Secretary.

CALIFORNIA CHEMICAL

COMPANY,

By /s/ WILLIAM V. WILLIAMS,

Vice President. [10]

EXHIBIT "A"

GYPSUM ANALYSIS AND SPECIFICATION

The gypsum ($\text{CaSO}_4 \cdot 2\text{H}_2\text{O}$) purchased under this contract shall conform to the following analysis:

Silica	SiO_2	.06
Ferric oxide.....	Fe_2O_3	.06
Aluminum oxide.....	Al_2O_3	.02
Calcium oxide.....	CaO	32.32
Magnesium oxide.....	MgO	.29
Sulphur trioxide.....	SO_3	45.89
Ignition loss. Comb.....	$\text{H}_2\text{O} + \text{CO}_2$	20.70
		<hr/>
		99.34%

Combined water content = 20.40%.

Gypsum content ($\text{CaSO}_4 \cdot 2\text{H}_2\text{O}$) calculated from Combined water = 97.51%.

Methods of analysis shall conform with the A.S.T.M. "Standard Methods for Testing Gypsum and Gypsum Products" No. C-26-33; except that free moisture shall be determined by drying at room temperature to constant weight.

Free moisture shall not exceed 1%. Water soluble salts Other than CaSO_4 shall not exceed 0.4%.

[Endorsed]: Filed Feb. 27, 1947. [11]

[Title of District Court and Cause.]

MOTION AND NOTICE OF MOTION FOR ORDER FOR DEPOSIT IN COURT

To Westvaco Chlorine Products Corporation, and
Messrs. Bacigalupi, Elkus & Salinger, its Attorneys:

You and each of you will please take notice that on [12] the 14th day of March, 1947, in Room 268, United States Post-Office and Court-House Building, Seventh and Mission Streets, San Francisco, at 10 o'clock a.m. of that day, or as soon thereafter

as counsel can be heard, the undersigned will move the above-entitled court as follows:

1. To order the deposit with the court of the sum of 96 cents per ton for all gypsum sold and delivered after January 31, 1947, by defendant to plaintiff under the contract attached as "Exhibit A" to the complaint on file herein, the deposits relating to gypsum delivered in each month commencing with the month of February, 1947, to be paid into court on or before the 15th day of the succeeding month; such deposits to continue until further order of the court;

2. To order that upon making such deposits, and upon paying to defendant, as provided in said contract, the balance of the price per ton of gypsum claimed by defendant, to wit \$4.48 per ton, less any deductions under paragraph (5) of said contract, plaintiff shall be deemed to have fully performed its obligations of payment with respect to each month's deliveries of gypsum covered by each deposit and payment so made.

Annexed hereto is a draft of the form of order sought by plaintiff upon this motion.

Said motion will be based upon this notice and the papers filed herewith, and upon the complaint on file in the above-entitled cause.

/s/ PILLSBURY, MADISON &
SUTRO,

/s/ EUGENE D. BENNETT,

/s/ MAURICE D. L. FULLER,

/s/ WALLACE L. KAAPCKE,

Attorneys for Plaintiff.

(Acknowledgment of Receipt of Copy.) [13]

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND
AUTHORITIES

There is in controversy between plaintiff and defendant, inter alia, the sum of 96 cents per ton of gypsum delivered to plaintiff by defendant, as set forth in the first cause of action [14] in the complaint. Part of the relief sought in the action is the disposition of this sum.

In such a case, upon notice to the parties and by leave of court, a party may deposit the sum in dispute with the court.

(Rule 67, Federal Rules of Civil Procedure
(28 U.S.C.A. following section 723(c)).

/s/ PILLSBURY, MADISON &
SUTRO,

/s/ EUGENE D. BENNETT,

/s/ MAURICE D. L. FULLER,

/s/ WALLACE L. KAAPCKE.

Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 11, 1947. [15]

[Title of District Court and Cause.]

ORDER SHORTENING TIME

Upon the ex parte application of plaintiff, and good cause appearing therefor, it is hereby

Ordered that the provisions of Rule 6(d) of the Federal Rules of Civil Procedure and of Rule 7(d)

of the Rules of Practice [16] of this court for the hearing of motions upon five days' notice are hereby dispensed with for the purposes of hearing plaintiff's motion for an order for deposit in court, a copy of which is attached hereto, and the 14th day of March, 1947, at 10 o'clock a.m. is hereby fixed as the time for hearing said motion.

Dated: March 11, 1947.

/s/ MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed Mar. 11, 1947. [17]

[Title of District Court and Cause.]

ORDER FOR DEPOSIT IN COURT

Upon motion of the plaintiff coming regularly on for hearing this 14th day of March, 1947, and good cause appearing therefor, it is hereby Ordered:

1. That on or before the 15th of each month, commencing on March 15, 1947, plaintiff, Pacific Portland Cement Company, shall deposit with the court the sum of 96 cents per ton for all gypsum sold and delivered to it during the preceding calendar month by defendant, Westvaco Chlorine Products Corporation, under the contract attached as "Exhibit A" to the complaint on file herein. Such deposits shall continue until the further order of the court, and the fund accumulated in the hands

of the court by such deposits shall be held subject to the further order of the court.

2. Upon making such deposits, and upon paying to defendant, as provided in said contract, the balance of the price per ton of gypsum claimed by defendant, to wit, \$4.48 per ton, less any deductions under paragraph (5) of said contract, plaintiff shall be deemed to have fully performed its obligations of payment with respect to each month's deliveries of gypsum covered by each deposit and payment so made.

3. Nothing in this order contained is intended to preclude any price change or changes pursuant to and in accordance with the provisions of paragraph (6) of said contract during the pendency of this action, and in the event of any such change the court reserves jurisdiction to amend this order appropriately.

Done in open court, this 14th day of March, 1947.

MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed Mar. 14, 1947. [18]

[Title of District Court and Cause.]

ANSWER

Now comes Westvaco Chlorine Corporation, a corporation, the defendant above-named, and answering plaintiff's complaint herein alleges as follows:

FIRST DEFENSE TO FIRST COUNT

1. Admits the allegations contained in paragraph 4 of the complaint, except that defendant denies that the instrument attached to the complaint marked "Exhibit A" is a valid contract.

2. As to the allegations contained in paragraph 5 of the complaint, admits that a controversy has existed and does now exist between defendant and plaintiff as to the provisions of the said alleged agreement and the rights and obligations of the parties thereunder to the extent and in the manner in said complaint alleged, except as the allegations of said complaint are herein denied.

3. As to the allegations contained in paragraph 6 of the complaint, denies that plaintiff was and/or is without knowledge that defendant's cost of production actually had increased 18c per ton, and in this regard, defendant alleges that in August, 1941, plaintiff was furnished by defendant with complete and detailed information, confirming that defendant's cost of production actually had increased at least 18c per ton, which increase was duly accepted by plaintiff. Defendant admits that plaintiff paid defendant at the rate of \$2.98 per ton commencing October 5, 1941, for gypsum delivered under said alleged agreement, except for certain so-called moisture credit deductions made by plaintiff, a portion of which were improperly made, all as hereinafter averred.

4. As to the allegations of paragraph 7 of said complaint, defendant admits that on or about January 14, 1944, defendant notified plaintiff that, ef-

fective March 15, 1944, the price of gypsum would be increased under paragraph 6 of said alleged agreement to \$3.76 per ton by reason of a further increase of 78c per ton in [19] defendant's cost of production of gypsum; defendant further admits that plaintiff duly paid defendant at the rate of \$3.76 per ton for gypsum delivered under said alleged agreement from September 4, 1946, to and including November 12, 1946, except for certain so-called moisture credit deductions made by plaintiff, a portion of which were improperly made by plaintiff, all as hereinafter averred. Except as hereinabove expressly admitted, defendant denies specifically and generally, each and every, all and singular, the allegations of said paragraph 7 both conjunctively and disjunctively. In this respect defendant avers that defendant's cost of production of gypsum actually had increased 78c per ton and that pursuant to paragraph 6 of said alleged agreement, defendant was entitled to be paid \$3.76 per ton for gypsum delivered under said alleged agreement on and after March 15, 1944. Defendant denies that the payments or any of them made by plaintiff to defendant as in said paragraph 7 alleged were in excess of the price properly chargeable by defendant to plaintiff under said alleged agreement in any amount whatsoever or at all.

5. Answering the allegations of paragraph 8 of said complaint, defendant admits that on or about September 13, 1946, defendant notified plaintiff that, effective November 13, 1946, the price of gypsum was increased under paragraph 6 of said alleged agreement of \$4.48 per ton by reason of an addi-

tional increase of at least 72c per ton in defendant's cost of production of gypsum; defendant further admits that plaintiff paid defendant \$4.48 per ton for gypsum delivered under said alleged agreement from November 13, 1946, to and including January 31, 1947. Except as hereinabove expressly admitted, defendant denies specifically and generally, each and every, all and singular, the allegations of said paragraph 8, both conjunctively and disjunctively. In this respect, defendant avers that defendant's cost of production of gypsum actually increased at least 72c per ton, and that pursuant to paragraph 6 of said alleged agreement, defendant was entitled to be paid \$4.48 per ton for gypsum delivered under said alleged agreement on and after November 13, 1946. Defendant denies that the payments or any of them made by plaintiff to defendant as in said paragraph 8 of the complaint alleged, were in excess of the [20] price properly chargeable by defendant under said alleged agreement in any amount whatsoever or at all.

6. Defendant denies that it has erroneously construed the term "cost of production" as used in paragraph 6 of said alleged agreement and/or continues to do so; defendant further denies that through the use of improper accounting and/or other methods or otherwise or at all, defendant has erroneously determined its cost of production of gypsum; defendant further denies that in violation of said alleged agreement defendant has refused plaintiff access of defendant's books of accounts and records, showing its production cost of

gypsum. Defendant admits that it has denied plaintiff access to certain portions of and entries in defendant's books of account and records not properly the subject of inspection by plaintiff for the reason that such entries and records contain detailed information of a confidential and secretive nature and are trade secrets; defendant has offered to plaintiff to permit a reputable, disinterested, independent certified public accountant to inspect said entries and records to ascertain the ultimate facts therein set forth, divorced from said trade secrets, and to convey to plaintiff any and all such ultimate information therein contained pertaining to defendant's cost of producing gypsum, of which offer plaintiff has failed to avail itself or take advantage thereof.

SECOND DEFENSE TO FIRST COUNT

As a second, separate, and affirmative defense to the first count of plaintiff's complaint herein, defendant alleges as follows:

That said alleged agreement referred to in plaintiff's complaint and attached as "Exhibit A" thereto, is void for want of consideration, lack of mutuality, and is not a valid contract.

THIRD DEFENSE TO FIRST COUNT

As a third, separate, and affirmative defense to the first count of plaintiff's complaint herein, defendant alleges as follows:

That said alleged agreement referred to in plaintiff's complaint and [21] attached as "Exhibit A"

thereto, is ineffective and void in that all the essential terms of a contract of sale and to sell personal property in excess of \$500.00 are not in writing, as required by Section 1724 of the Civil Code of the State of California, in that essential terms of a contract of sale and to sell personal property, to wit, the price and the quantity of merchandise sold or to be sold, are not set forth in definite, ascertainable terms, and the purported price and quantity are so vague, indefinite, and uncertain as to be nugatory, void, and unenforceable.

FOURTH DEFENSE TO FIRST COUNT

As a fourth, separate, and affirmative defense to the first count of plaintiff's complaint herein, defendant alleges as follows:

That the said alleged agreement referred to in plaintiff's complaint and attached as "Exhibit A" thereto, is ineffective, void, and unenforceable for the reason that essential provisions thereof, to wit, the price and quantity of merchandise sold or to be sold, are not set forth with certainty and definiteness.

FIFTH DEFENSE TO FIRST COUNT

As a fifth, separate, and affirmative defense to the first count of plaintiff's complaint herein, defendant alleges as follows:

That the plaintiff is estopped and has waived any right that it might otherwise have had to deny that the expression "cost of production," as said expression is used in paragraph 6 of said alleged

agreement, means and was intended by the parties to said alleged agreement to mean the cost of production as derived and used by defendant from time to time; that in August, 1941, defendant notified plaintiff of an increase in price, pursuant to paragraph 6 of said alleged agreement, because of an increase in its cost of production of gypsum; that thereafter plaintiff questioned a portion of said increase in price, whereupon, plaintiff was furnished with information and data substantiating said price increase and disclosing the method employed by defendant in computing its said cost of production. Thereafter plaintiff duly accepted said price increase and computation and paid defendant for gypsum sold and delivered at said increased price without protest; [22] that in deriving its cost of production, as aforesaid, defendant included indirect costs, including overhead, and at all times since has contended and does now assert that such indirect costs are properly includable in the cost of production of gypsum, as said term is used in said alleged agreement; plaintiff on the other hand asserts that such indirect costs are not properly includable in such cost of production. That in reliance upon plaintiff's acceptance of said price increase in 1941 and the method employed by defendant in deriving the same, to wit, the inclusion of indirect costs, defendant did from time to time expend substantial sums of money in expanding and improving its facilities for the production of gypsum; that had defendant anticipated

that plaintiff would at any time question defendant's right to include indirect costs in its cost of production of gypsum, defendant would not have so expended said sums of money; that defendant has irrevocably altered and changed its position as aforesaid by reason of said expenditures, and defendant would be damaged if it should now be declared that said indirect costs are not properly includable in said cost of production of gypsum or that such inclusion is not in accordance with the provisions of paragraph 6 of said alleged agreement.

SIXTH DEFENSE TO FIRST COUNT

As a sixth, separate, and affirmative defense to the first count of plaintiff's complaint herein, defendant alleges as follows:

That the payment by plaintiff to defendant of \$3.76 per ton for gypsum delivered under said alleged agreement from September 4, 1946, to and including November 12, 1946, was made by plaintiff without protest, with full and complete knowledge on the part of plaintiff as to the items of defendant's cost of producing gypsum, on the basis of which said price was determined, and the method employed by defendant in determining said price, and plaintiff thereby waived any right that it otherwise might have had to question the propriety of said price of \$3.76 per ton for the gypsum so delivered by defendant to plaintiff.

SEVENTH DEFENSE TO FIRST COUNT

As a seventh, separate, and affirmative defense to the first [23] count of plaintiff's complaint herein, defendant alleges as follows:

That plaintiff is in default in the performance of its obligations under the terms of said alleged agreement referred to in plaintiff's complaint and attached as "Exhibit A" thereto in that plaintiff has breached said alleged agreement in material respects as follows:

1. That pursuant to paragraph 1 of said alleged agreement, plaintiff agreed to purchase all gypsum produced at the defendant's plant in excess of 4,000 tons per annum, which excess was to be available for use for agricultural, building, or construction purpose or any other commercial purpose other than for chemical, pharmaceutical, or scientific purposes, which latter purposes were reserved exclusively to the defendant. Plaintiff in violation of said expressed terms of said alleged agreement sold gypsum for chemical, pharmaceutical and scientific purposes, which said gypsum was purchased by plaintiff from defendant.

2. That plaintiff has failed to pay defendant the full purchase price, as in said alleged agreement provided, for gypsum sold and delivered by defendant to plaintiff pursuant thereto.

EIGHTH DEFENSE TO FIRST COUNT

As an eighth, separate, and affirmative defense to the first count of plaintiff's complaint herein, defendant alleges as follows:

That the alleged cause of action is barred by the terms and provisions of the California Code of Civil Procedure, Section 343, in that said cause of action accrued more than four years preceding commencement of this action.

NINTH DEFENSE TO FIRST COUNT

As a ninth, separate, and affirmative defense to the first count of plaintiff's complaint herein, defendant alleges as follows:

That the alleged cause of action is barred by the terms and provisions of the California Code of Civil Procedure, Section 337, Subdivision 1, in that said cause of action accrued more than four years next preceding commencement of this action.

TENTH DEFENSE TO FIRST COUNT

As a tenth, separate, and affirmative defense to the first count [24] of plaintiff's complaint herein, defendant alleges as follows:

That plaintiff asserts and contends that defendant's "cost of production," as said expression is used in paragraph 6 of said alleged agreement, does not include indirect costs, such as overhead. Continuously, ever since August, 1941, plaintiff has known that defendant has contended, and still does contend, that such indirect costs are properly includable in defendant's "cost of production" of gypsum. Although so informed, plaintiff has delayed unduly and inexcusably in commencing this action for a declaratory judgment that such indirect costs are not properly includable in defend-

ant's cost of production, wherefore, plaintiff's alleged cause of action is barred by laches.

ELEVENTH DEFENSE TO FIRST COUNT

As an eleventh, separate, and affirmative defense to the first count of plaintiff's complaint herein defendant alleges as follows:

That said first count fails to state a cause of action upon which declaratory relief can be granted by this Court.

FIRST DEFENSE TO SECOND COUNT

1. Defendant repeats and realleges herein paragraphs 1 and 2 of its First Defense to the First Count of plaintiff's complaint.

2. Answering the allegations of paragraph 2 of said Second Count, defendant admits that plaintiff has from time to time made deductions from the price of gypsum sold to plaintiff pursuant to said alleged agreement by reason of the alleged failure of various lots of said gypsum to conform within 2% in gypsum content to the chemical analysis and specifications set forth in paragraph 5 of said alleged agreement. Defendant admits that defendant has asserted and now asserts and alleges that the deductions so made by plaintiff in the total amounts of \$2,165.10 were not authorized in whole or in part by paragraph 5 of said alleged agreement, and that defendant has demanded that plaintiff pay said sum of \$2,165.10 to defendant; denies that such assertion by defendant is erroneous and denies that any of the deductions

so made by plaintiff in the sum of \$2,165.10 were proper or permissible; that plaintiff is thereby indebted to defendant in the sum of \$2,165.10 for deductions improperly made by [25] plaintiff as aforesaid, no part of which sum has been paid although duly demanded and the whole amount whereof is now due, owing and unpaid by plaintiff to defendant.

SECOND DEFENSE TO SECOND COUNT

As a second, separate, and affirmative defense to the second count of plaintiff's complaint herein, defendant alleges as follows:

That said second count fails to state a cause of action upon which declaratory relief can be granted by this Court.

FIRST DEFENSE TO THIRD COUNT

1. Defendant repeats and realleges herein paragraphs 1 and 2 of its First Defense to the First Count of plaintiff's complaint.

2. Defendant claims and alleges that under the terms of paragraph 3 of said alleged agreement the right of plaintiff to refuse to purchase and accept in excess of 2,000 tons in any one month applies and is operative only in a calendar year in which plaintiff has elected to refuse to purchase and accept in excess of 20,000 tons of gypsum and that in any calendar year in which plaintiff has so failed to elect plaintiff is obligated to purchase and accept all gypsum produced by defendant in approximately equal monthly quantities as in said alleged agreement provided.

SECOND, THIRD, FOURTH, FIFTH AND SIXTH DEFENSES TO THE THIRD COUNT

As second, third, fourth, fifth and sixth separate and affirmative defenses respectively to the Third Count of plaintiff's complaint herein, defendant repeats and re-alleges with the same force and effect as though the same were re-incorporated and set forth herein in detail the respective defenses referred to in the answer hereinabove as follows: "Second Defense to First Count," "Third Defense to First Count," "Fourth Defense to First Count," "Seventh Defense to First Count," and "Eleventh Defense to First Count."

FOR A FIRST SEPARATE AND DISTINCT COUNTER CLAIM BY DEFENDANT AGAINST PLAINTIFF

1. Plaintiff is and at all times herein mentioned was a corporation organized and existing under the laws of the State of California. [26]

2. Defendant is and at all times herein mentioned was a corporation organized and existing under the laws of the State of Delaware, and qualified under the laws of the State of California to do business therein, and has designated an agent in the City and County of San Francisco and within this district upon whom process may be served herein.

3. The value of the matter involved in this suit is in excess of the sum of \$3,000, exclusive of in-

terest and costs, and because of the diversity of citizenship between plaintiff and defendant, plaintiff has elected to commence this action in the District Court of the United States for the Northern District of California, Southern Division.

4. On or about the 29th day of January, 1937, plaintiff and defendant entered into that certain written alleged agreement referred to in plaintiff's complaint herein and attached thereto as "Exhibit A," thereof, and hereby referred to and incorporated herein by reference with the same force and effect as if herein set out in full. In or about the month of March, 1937, defendant, with plaintiff's written consent, succeeded to all of the right, title, and interest under said alleged agreement of said California Chemical Company.

5. Between December 31, 1940, and August 31, 1946, plaintiff from time to time made unauthorized deductions from the price of gypsum sold by defendant to plaintiff during said period by reason of the alleged failure of various lots of said gypsum to conform within 2% in gypsum content to the chemical analysis and specifications set forth in paragraph 5 of said alleged agreement. The aggregate amount of such unauthorized deductions so made by plaintiff was the sum of \$2,165.10. No part of the sum of \$2,165.10 has been paid by plaintiff to defendant, although duly demanded, and the whole amount thereof is now due and owing and unpaid by plaintiff to defendant.

FOR A SECOND SEPARATE AND DISTINCT COUNTERCLAIM BY DEFENDANT AGAINST PLAINTIFF

1. Defendant repeats and re-alleges herein paragraphs 1, 2, 3, and 4 of defendant's first counterclaim above, with the same force and effect as though herein separately stated and set forth. [27]

2. During the times specified in the complaint and pursuant to paragraph 1 of said alleged agreement, referred to in plaintiff's complaint and attached as "Exhibit A" thereto, plaintiff agreed to purchase all gypsum produced at the defendant's plant in excess of four thousand (4,000) tons per annum which excess was to be available to plaintiff for use in agricultural, building, or construction purposes, or any other commercial purpose other than for chemical, pharmaceutical, or scientific purposes, and it was the expressed intent and understanding of the parties to said alleged agreement that the plaintiff was not to purchase gypsum for chemical, pharmaceutical, or scientific purposes, which purposes were reserved exclusively to the defendant. Plaintiff, in violation of said expressed terms of said alleged agreement between the parties hereto, sold gypsum for chemical, pharmaceutical, and scientific purposes, which said gypsum was purchased by plaintiff from defendant.

FOR A THIRD SEPARATE AND DISTINCT COUNTERCLAIM BY DEFENDANT AGAINST PLAINTIFF

1. Defendant repeats and re-alleges herein paragraphs 1, 2, 3, 4, and 5 of defendant's first coun-

terclaim above and paragraph 2 of the defendant's second counterclaim above with the same force and effect as though herein separately stated and set forth.

2. By reason of the aforesaid breaches of said alleged agreement by plaintiff, defendant asserts and contends that defendant is entitled to rescind and terminate said alleged agreement, and defendant does hereby assert its intention and election to so rescind and terminate said alleged agreement.

Wherefore, Defendant Prays as Follows:

1. That this Court adjudge that said alleged agreement, dated January 29, 1937, a copy of which is attached to plaintiff's complaint as "Exhibit A" thereto, is null, void, and of no force and effect.

2. That defendant have judgment against the plaintiff herein dismissing the plaintiff's complaint and each count therein on the merits. [28]

3. That this Court adjudge that plaintiff pay to the defendant on the first counterclaim the sum of \$2,165.10, together with interest thereon.

4. As an alternative to Subdivision 1 hereinabove, that this Court adjudge and declare that the plaintiff has breached the terms and provisions of the said alleged agreement in material respects and the said alleged agreement be de-

clared rescinded and terminated by reason of said breaches.

5. As a second alternative that this Court adjudge and declare the respective rights, obligations, and other legal relations of the plaintiff and defendant created or existing with respect to the said alleged agreement and in particular that:

(a) Defendant's cost of producing gypsum as determined by defendant from time to time and the resultant increases in price established by defendant as alleged in plaintiff's complaint have been in accordance with the terms and provisions of said alleged agreement;

(b) The deductions made by plaintiff from the price of gypsum by reason of its alleged failure to conform to the specifications set forth in said alleged agreement in the aggregate sum of \$2,165.10, were improper; and

(c) The right of plaintiff to refuse to purchase and accept in excess of 2,000 tons of gypsum in any one month as provided in paragraph 3 of said alleged agreement applies and is operative only in a calendar year in which plaintiff has elected to refuse to purchase and accept in excess of 20,000 tons of gypsum.

7. That plaintiff take nothing by its complaint herein, and that defendant have judgment for its cost of suit and disbursements herein.

8. For such other and further relief as the Court deems proper in the premises.

TADINI BACIGALUPI,
CLAUDE ROSENBERG,
BACIGALUPI, ELKUS &
SALINGER,

Attorneys for Defendant. [29]

Receipt of a copy of the within Answer is hereby admitted this day of May, 1947.

.....,
Attorneys for Plaintiff.

[Endorsed]: Filed May 14, 1947. [30]

[Title of District Court and Cause.]

PLAINTIFF'S REPLY TO COUNTERCLAIMS

Replying to the counterclaims set forth in the answer of defendant, Westvaco Chlorine Products Corporation, plaintiff denies and avers as follows:

REPLY TO FIRST COUNTERCLAIM

1. Plaintiff denies all the allegations contained in that part of paragraph 4 of the defendant's first counterclaim commencing with the words "On or about," in line 18, page 11, and ending with the word "agreement," in line 20, page 11, of the answer; and avers that on or about the 29th day of January, 1937, plaintiff and California Chemical Company entered into the agreement attached to the complaint on file herein as Exhibit A thereto.

2. Plaintiff denies all the allegations contained in paragraph 5 of defendant's first counterclaim.

REPLY TO SECOND COUNTERCLAIM

1. In reply to paragraph 1 of defendant's second counterclaim, plaintiff repeats and incorporates herein to the same extent as though set forth in full, plaintiff's denials and averments in reply to paragraph 4 of defendant's first counterclaim.

2. Plaintiff denies all the allegations contained in paragraph 2 of defendant's second counterclaim; and avers that plaintiff's agreement in the premises was and is as set forth in the contract attached to the complaint on file herein as Exhibit A thereto.

REPLY TO THIRD COUNTERCLAIM

1. In reply to paragraph 1 of defendant's third counterclaim, plaintiff repeats and incorporates herein to the same extent as though set forth in full, plaintiff's denials and averments in reply to paragraphs 4 and 5 of defendant's first counterclaim and in reply to paragraph 2 of defendant's second counterclaim.

2. Plaintiff denies all the allegations contained in paragraph 2 of defendant's third counterclaim.

Wherefore, plaintiff prays that defendant take nothing [31] by reason of its counterclaims and that plaintiff have judgment as prayed in the complaint on file herein.

/s/ PILLSBURG, MADISON &
SUTRO,

/s/ EUGENE D. BENNETT,

/s/ MAURICE D. L. FULLER,

/s/ WALLACE L. KAAPCKE,

Attorneys for Plaintiff.

(Acknowledgment of Service attached.)

[Endorsed]: Filed July 15, 1947. [32]

[Title of District Court and Cause.]

ORDER FOR REFUND OUT OF DEPOSIT IN
COURT AND FOR REDUCTION OF FUR-
THER DEPOSITS

Pursuant to the stipulation of the parties endorsed hereon, it is hereby Ordered:

1. That plaintiff is entitled to a refund in the amount of \$3,078.94 out of the sums heretofore deposited by plaintiff in Court, pursuant to the order of this Court dated March 14, 1947; and the Clerk of this Court is hereby ordered to disburse said sum of \$3,078.94 to the plaintiff.

2. The deposits to be made by plaintiff with the Court pursuant to paragraph 1 of said order of March 14, 1947, are hereby reduced to 84c per ton instead of 96c per ton, commencing with the payment due on October 15, 1947.

3. Upon making such deposits and upon paying to defendant as provided in the contract attached as Exhibit "A" to the complaint on file herein, the balance of the price per ton claimed by defendant, to wit, \$4.36 per ton, less any deductions under paragraph (5) of said contract, plaintiff shall be deemed to have fully performed its obligations of payment with respect to each month's deliveries of gypsum covered by each deposit and payment so made.

4. This order is made for the purpose of correcting an excess charge of 12c per ton by defendant in the price per ton of gypsum claimed by it effective November 13, 1946, and is made

without prejudice to the rights of either party with respect to any other or further alleged excess charges, or any other issue in the above entitled cause.

5. Except as amended by this order, the aforesaid order of March 14, 1947, shall remain in effect.

Done in open Court, this 19th day of September, 1947.

MICHAEL J. ROCHE,
United States District Judge.

It is hereby stipulated that the foregoing order may be entered by consent.

Dated this 12th day of September, 1947.

/s/ PILLSBURY, MADISON &
SUTRO,

/s/ EUGENE D. BENNETT,

/s/ MAURICE D. L. FULLER,

/s/ WALLACE L. KAAPCKE,

Attorneys for Plaintiff.

[Endorsed]: Filed Sept. 19, 1947. [78]

[Title of District Court and Cause.]

AMENDMENT TO PLAINTIFF'S REPLY TO
COUNTERCLAIMS

The plaintiff above named hereby amends its reply filed herein on July 15, 1947, to the counterclaims contained in the answer of the defendant filed herein on May 14, 1947, by adding to said reply the following:

Affirmative Defense to First, Second and Third Counterclaims,

As a separate and affirmative defense to the first, second and third counterclaims, and each of them, contained in defendant's answer herein plaintiff alleges that:

Each of the alleged causes of action set forth in said counterclaims is barred by the provisions of the California Code of Civil Procedure section 337, subdivision 1, and section 343, in that each of said causes of action accrued more than four years next preceding defendant's filing of said counterclaims and next preceding the commencement of this action.

Plaintiff further alleges that each of the alleged causes of action set forth in said counterclaims is barred by the provisions of the California Code of Civil Procedure section 339, subdivision 1. in that each of said causes of action accrued more than two years next preceding defendant's filing of said counterclaims and next preceding the commencement of this action.

Wherefore, plaintiff prays that defendant take nothing by reason of said counterclaims and that plaintiff have judgment as prayed in the complaint on file herein.

/s/ PILLSBURY, MADISON &
SUTRO,

/s/ EUGENE D. BENNETT,

/s/ MAURICE D. L. FULLER,

/s/ WALLACE L. KAAPCKE. [79]

It is hereby stipulated by defendant that the foregoing amendment to plaintiff's reply may be filed without the necessity of plaintiff's making a motion for leave of court to file the same. This stipulation shall not, however, be deemed an admission of the validity of any of the defenses asserted in the said amendment, and shall be without prejudice to any rights of defendant in respect thereto.

/s/ CLAUDE N. ROSENBERG,
/s/ BACIGALUPI, ELKUS &
SALINGER.

Said amendment may be filed.

MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed Oct. 2, 1947. [80]

[Title of District Court and Cause.]

STIPULATION FOR COMPROMISE AND DIS-
MISSAL OF DEFENDANT'S FIRST COUN-
TERCLAIM

Whereas by its first counterclaim in the above-entitled action, Defendant seeks to recover from Plaintiff the sum of Two Thousand One Hundred Sixty-five Dollars and Ten Cents (\$2,165.10) for alleged unauthorized deductions from the price of gypsum sold by Defendant to Plaintiff, which deductions were made and taken by Plaintiff during the period between December 31, 1940, and October 31, 1946; and

Whereas, Plaintiff admits being indebted to Defendant in the sum of Five Hundred Thirty-nine Dollars and Twenty-four Cents (\$539.24) for erroneous deductions taken by Plaintiff during said period, which Plaintiff claims resulted through inadvertence, but contends that all other deductions taken by Plaintiff during said period were justified by and in accordance with the provisions of paragraph 5 of that certain contract between Plaintiff and Defendant dated January 29, 1937, which contract is the subject of the above suit; and

Whereas, during the course of the trial of the above-entitled action, Plaintiff and Defendant agreed that they would compromise the aforementioned claim and relieve the Court of the necessity of determining and rendering judgment upon Defendant's first counterclaim.

Now, Therefore, it is hereby stipulated and agreed by and between the Plaintiff and Defendant above named, through their respective counsel, as follows:

1. Concurrently herewith Plaintiff has paid unto Defendant the sum of One Thousand Three Hundred Twenty-nine Dollars and Eighty-three Cents (\$1,329.83), and said sum has been received and accepted by Defendant, in full [89] settlement and satisfaction of the claim of \$2,165.10 asserted by Defendant in Defendant's said first counterclaim.

2. In consideration of the payment of said sum by Plaintiff to Defendant, Plaintiff and Defendant do jointly stipulate that said first counterclaim may be and it is hereby dismissed.

3. The compromise of said first counterclaim as herein provided for shall be without prejudice

to any claims, demands or contentions of either party hereto in the above action, other than the specific money claim in the sum of \$2,165.10 asserted by Defendant in said first counterclaim, and shall likewise be without prejudice to any claim which Defendant now has or hereafter may have against Plaintiff on account of any deductions taken by Plaintiff subsequent to October 31, 1946. It is hereby expressly stipulated and agreed between the parties that nothing herein contained is intended or to be construed as a determination of the controversy existing between the parties with respect to the intent and interpretation of paragraph 5 of said agreement.

Dated this 10th day of February, 1948.

PILLSBURY, MADISON &
SUTRO,

Attorneys for Plaintiff.

BACIGALUPI, ELKUS &
SALINGER,

Attorneys for Defendant.

[Endorsed]: Filed Feb. 17, 1948. [90]

[Title of District Court and Cause.]

ORDER FOR ENTRY OF JUDGMENT

The above-entitled cause having been heretofore submitted and being now fully considered, it is by the Court

Ordered that there be entered herein, upon find-

ings of fact and conclusions of law, judgment declaring the rights and liabilities of the parties hereto as follows:

1. Said contract dated January 29, 1937, is a valid contract.

2. The term "cost of production" as used in Paragraph (6) of said contract is not limited to "actual" or "direct" costs.

3. Defendant's cost of producing gypsum as determined [91] by defendant from time to time and the resultant increases in price established by defendant as alleged in plaintiff's complaint have been in accordance with the terms and provisions of said agreement.

4. Plaintiff's rights of refusal under Paragraph (3) of said contract are separate and distinct.

5. The right of deduction for failure of the gypsum to conform to the required specifications, permitted by Paragraph (5) of said contract, does not permit fractional deductions for fractional percentages.

6. The respective parties will pay their own costs.

Dated: March 30th, 1948.

MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed Mar. 30, 1948. [92]

[Title of District Court and Cause.]

STIPULATION AND ORDER RE PAYMENTS
UNDER CONTRACT AND RE STAY OF
JUDGMENT

Whereas by its judgment herein the above-entitled court has determined, among other things, that the price of [140] gypsum under the contract between the parties hereto dated January 29, 1937, is \$3.76 per ton for the period from September 4, 1946, to and including November 12, 1946, and is \$4.36 per ton for the period from and after November 13, 1946; and plaintiff is required by said judgment hereafter to pay defendant \$4.36 per ton for gypsum sold and delivered under said contract; and

Whereas plaintiff has paid for gypsum sold and delivered under said contract during the period from and including February 1, 1947, to and including March 31, 1948, in the manner provided in this court's order of March 14, 1947, as amended September 19, 1947, depositing a portion of each monthly payment in court in accordance with said order; and defendant has moved for the termination of said order and the disbursement to it of the sum heretofore paid into court thereunder; and

Whereas plaintiff desires to take an appeal herein and to have a stay pending its appeal, and this stipulation is intended to operate as a stay and supersedeas upon said appeal in lieu of continued deposits in court and retention by the court of the

sums on deposit and in lieu of plaintiff's giving a supersedeas bond;

Now, Therefore, it is hereby stipulated between the parties hereto that:

1. The sums heretofore paid into court by plaintiff under the order of the above-entitled court dated March 14, 1947, as amended September 19, 1947, which sums now total \$37,603.61 and relate to gypsum sold and delivered by defendant to plaintiff under the contract of January 29, 1937, for the period from and including February 1, 1947, to and including March 31, 1948, shall be immediately paid over to defendant by the clerk. [141]

2. As to all payments for gypsum sold and delivered by defendant to plaintiff under said contract subsequent to March 31, 1948, said order is terminated, and plaintiff shall pay directly to defendant the full price claimed by defendant to be payable for such gypsum, to wit, 4.36 per ton less deductions under paragraph (5) of said contract.

3. Plaintiff shall pay to defendant the sum of \$68.12 deducted by it, due to the inclusion of fractions of a per cent of deficiency in gypsum content in calculating deductions under paragraph (5) of said contract, from the price of gypsum sold and delivered under said contract for the period from November 1, 1946, to and including March 31, 1948. As to all gypsum sold and delivered under said contract subsequent to March 31, 1948, plaintiff shall pay therefor without any such deductions on account of fractions, but plaintiff shall accompany its monthly payment for gypsum with a statement of the amount

of any deduction claimed on account of such fractions.

4. The payment to defendant of the sums now on deposit pursuant to paragraph 1 hereof, and payments by plaintiff to defendant under paragraphs 2 and 3 thereof shall be without prejudice to any of plaintiff's rights under said contract or to any of its rights in the above-entitled cause, including its rights on appeal, and it shall not be deemed that any such right has been waived by plaintiff by reason of such payments.

5. If it is ultimately determined by final judgment herein (not subject to further review or the time for further review having expired) that any lower prices were or are payable by plaintiff to defendant than \$3.76 per ton for gypsum sold and delivered from September 4, 1946, to and including November 12, 1946, or \$4.36 per ton for gypsum sold and delivered from and [142] after November 13, 1946, then defendant shall refund to plaintiff the amounts plaintiff shall have paid to defendant in excess of the price or prices so determined to be payable. If it is so determined that plaintiff is entitled to include fractions of a per cent of deficiency in gypsum content in calculating deductions under paragraph (5) of said contract, the said \$68.12 paid by plaintiff shall also be refunded by defendant to plaintiff, together with any further refund to which plaintiff may be entitled on account of fractional percentage deductions not taken by plaintiff on shipments of gypsum subsequent to March

31, 1948. In this regard, plaintiff recognizes that defendant contends that none of the gypsum so shipped between November 1, 1946, to and including March 31, 1948, was below 95.51 per cent in gypsum content, and the parties mutually recognize that a dispute may arise between them with reference to the proper chemical analysis of gypsum sold and delivered under said contract subsequent to March 31, 1948. Accordingly, it is mutually stipulated and agreed that nothing herein contained shall operate as a waiver of such contention by defendant, nor to the prejudice of the position of either party in connection with any such dispute as may arise.

6. If at any time before such final determination of this cause defendant claims any further increase in the price of gypsum under said contract, the amount thereof may be paid to defendant until such determination, without prejudice to or waiver of plaintiff's right to contend that said increased payments or any part thereof are contrary to the contract and to sue to recover the same or otherwise have their validity determined.

7. Plaintiff shall not be required to give any bond for costs on appeal.

8. Nothing in this stipulation contained, nor anything [143] done pursuant thereto, shall operate to the prejudice of the rights of either party under said contract or in the above-entitled cause, including rights on appeal, and it shall not be deemed that any such right has been waived by

either party because of anything contained in this stipulation, or done pursuant thereto.

Dated: April 23d, 1948.

/s/ PILLSBURY, MADISON &
SUTRO,

/s/ EUGENE D. BENNETT,

/s/ MAURICE D. L. FULLER,

/s/ WALLACE L. KAAPCKE,

Attorneys for Plaintiff.

/s/ TADINI BACIGALUPI,

/s/ CLAUDE N. ROSENBERG,

/s/ BACIGALUPI, ELKUS &

SALINGER,

Attorneys for Defendant.

It is so Ordered this 26th day of April, 1948.

/s/ MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed Apr. 26, 1948. [144]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above-entitled cause came on regularly for trial before the above-entitled Court sitting without a jury, and evidence both oral and documentary having been introduced, and the parties having stipulated to certain matters, and the cause having been submitted for decision, the Court finds the facts and states the conclusions of law, as follows:

FINDINGS OF FACT

1. That the allegations of paragraphs 1, 2, 3 and 4 of Plaintiff's complaint herein are true. [145]

2. That defendant commenced the production of gypsum at Newark, California, in November, 1937, and ever since, (except for occasional and brief temporary periods), has been and still is there producing gypsum and various other products. That the plant in which said gypsum is produced was constructed between January 29, 1937, and November, 1937.

The Court makes no finding as to whether or not gypsum, as produced by defendant at its Newark, California, plant, is a by-product for the purposes of this action, for the reason that the Court finds as a fact that in determining the cost of production of a by-product which requires an independent physical plant, and independent labor to be performed upon it, in order to convert it into a marketable product, as does the gypsum produced by defendant at its Newark, California, plant, good accounting practice requires the inclusion of "overhead expense" and "indirect charges," as said terms are hereinafter used.

3. That the price and quantity of gypsum sold and to be sold pursuant to said contract are set forth in said contract with sufficient definiteness and certainty to be valid and enforceable. It is untrue that the provisions of said contract, or any of them, relating to the price and/or quantity of gypsum sold thereunder, are vague and/or uncertain and/or indefinite.

4. That it is untrue that said contract is lacking in consideration and/or mutuality and/or is not a valid contract.

5. That it is untrue that any of the gypsum purchased by plaintiff from defendant pursuant to said contract was resold by plaintiff for chemical, or pharmaceutical, or scientific purposes.

6. That it is untrue that plaintiff has been guilty of any breach of said contract which entitles defendant to rescind and/or terminate said contract, or that plaintiff has been [146] guilty of any conduct by which plaintiff became estopped to raise or by which plaintiff waived any objection to defendant's interpretation of paragraph (6) of said contract and/or to any determination by defendant of its cost of production of gypsum thereunder; that it is untrue that plaintiff has been guilty of any conduct amounting to or resulting in laches.

7. That a controversy has existed and does now exist between plaintiff and defendant as to the provisions of the aforementioned contract and the rights and obligations of the parties thereunder as follows:

(a) As to the meaning of paragraph (6) of said contract, including the meaning of the terms "cost of production," "cost of manufacture," and "in an amount not to exceed the actual advance in California's (defendant's) cost of manufacture" as said terms are used therein.

(b) As to whether or not defendant's cost of production of gypsum, as determined by defendant from time to time as hereinafter set forth, was cor-

rect and made in accordance with the provisions of said contract.

(c) As to the meaning of paragraph (5) of said contract, and specifically whether or not, in the event that the gypsum content falls below 95.51%, plaintiff is entitled to deduct from the contract price of said gypsum at the rate of 10c or a fractional part thereof for each per cent or fractional per cent that the gypsum content falls below 97.51%, or whether, in such event, plaintiff is entitled only to an allowance of 10c per ton for each full per cent, to the exclusion of fractional per cents, that the gypsum content falls below 97.51%.

(d) As to the proper method to be employed to determine the conformity or non-conformity of gypsum to the chemical analysis and specifications referred to in paragraph (5) of said contract. [147]

(e) As to whether or not plaintiff's right to refuse to purchase and accept in excess of 2,000 tons of gypsum in any one month as provided in paragraph (3) of said contract is separate and distinct from plaintiff's right to refuse to purchase in excess of 20,000 tons of said gypsum in any one calendar year as in said paragraph (3) provided.

8. That it is untrue that defendant has erroneously construed the term "cost of production" as used in paragraph (6) of said contract and/or continues to do so, and/or that defendant has erroneously and/or through the use of improper accounting and/or other methods determined its cost of production of gypsum. In this regard, the Court finds that defendant's cost of producing gypsum as

determined by defendant from time to time and the resultant increases in price established by defendant as hereinafter mentioned, have been in accordance with the terms and provisions of said contract.

9. That the terms "cost of production" and "cost of manufacture" as used in paragraph (6) of said contract are, and were intended by the contracting parties at the time of the execution thereof to be, synonymous; that such terms are not and were not intended by the contracting parties, or either of them, at the time of execution of said contract, to be limited or restricted to "actual" or "direct" costs. Said terms "cost of production" and "cost of manufacture" include, and were intended by the contracting parties at the time of execution of said contract to include, overhead expense and indirect charges which cannot be directly charged to or against each of the various products produced by defendant at its Newark, California, plant; and which must, therefore, be allocated to or apportioned among such products on some reasonable basis; that in determining its cost of production of gypsum from time to time defendant has fairly and reasonably allocated overhead expense and indirect [148] charges thereto.

10. That in August, 1941, defendant notified plaintiff that effective October 5, 1941, the price of gypsum to be sold and delivered by defendant to plaintiff pursuant to said contract would be increased under paragraph (6) of said contract to \$2.98 per ton by reason of the fact that defendant's cost of production of gypsum during the 12-month

period from July 1, 1940, to June 30, 1941, had increased 18c per ton over defendant's cost of production of gypsum during the 12-month period from July 1, 1939, to June 30, 1940; that plaintiff paid defendant at the rate of \$2.98 per ton for all gypsum delivered to plaintiff by defendant pursuant to said contract for the period from October 5, 1941, to September 4, 1946; that defendant's cost of production of gypsum, as determined by defendant, was \$1.66 per ton during the 12-month period from July 1, 1939, to June 30, 1940, and was \$1.84 per ton during the 12-month period from July 1, 1940, to June 30, 1941, and that the said respective costs of production, and the resultant price of \$2.98 per ton hereinbefore mentioned, were determined and established by defendant in accordance with the terms and provisions of said contract.

11. That on or about January 14, 1944, defendant notified plaintiff that effective March 15, 1944, the price of gypsum to be sold and delivered by defendant to plaintiff pursuant to said contract would be increased under paragraph (6) of said contract to \$3.76 per ton by reason of the fact that defendant's cost of production of gypsum during the 12-month period from January 1, 1943, to December 31, 1943, had increased 78c per ton over defendant's cost of production of gypsum during the 12-month period from January 1, 1942, to December 31, 1942.

That defendant's cost of production of gypsum, as determined by defendant, was \$1.93 per ton during the 12-month [149] period from January 1,

1942, to December 31, 1942, and was \$2.71 per ton during the 12-month period from January 1, 1943, to December 31, 1943, and that said respective costs of production, and the resultant price of \$3.76 per ton hereinbefore mentioned, were determined and established by defendant in accordance with the terms and provisions of said contract; that by reason of restrictions imposed by regulation of the Office of Price Administration, defendant was prohibited from charging or receiving the price of \$3.76 per ton, or any price in excess of \$2.98 per ton, from March 15, 1944, to September 4, 1946; that plaintiff protested said price of \$3.76 per ton claimed by defendant, on the ground that said increase of 78c per ton exceeded the actual increase in defendant's cost of production, and under such protest paid defendant at the rate of \$3.76 per ton for 5,091.01 tons of gypsum delivered by defendant to plaintiff pursuant to said contract subsequent to September 4, 1946, and up to and including November 12, 1946; that it is untrue that said payments or any of them so made were in excess of the price properly chargeable by defendant under said contract, by not less than 49c or any other amount per ton, or at all, and/or in a total sum of not less than \$2,494.59, or any other sum, or at all; that plaintiff has at all times been willing to pay 29c of the said increase of 78c per ton claimed by defendant.

12. That on or about September 13, 1946, defendant notified plaintiff that, effective November 13, 1946, the price of gypsum to be sold and deliv-

ered by defendant to plaintiff pursuant to said contract would be increased under paragraph (6) of said contract to \$4.48 per ton by reason of the fact that defendant's cost of production of gypsum during the 12-month period from July 1, 1945, to June 30, 1946, had increased 72c per ton over defendant's cost of production of gypsum during the [150] preceding 12-month period from July 1, 1944, to June 30, 1945; that plaintiff protested said increase to \$4.48 per ton claimed by defendant, on the ground that said increase of 72c per ton exceeded the actual increase in defendant's cost of production, and under such protest plaintiff paid to defendant at the rate of \$4.48 per ton for 7,199.31 tons of gypsum delivered by defendant to plaintiff pursuant to said contract for the period from and including November 13, 1946, to and including January 31, 1947; that subsequent to the commencement of this action, defendant notified plaintiff that defendant had been in error in stating and determining that its cost of production of gypsum during the 12-month period from July 1, 1945, to June 30, 1946, had increased 72c per ton, and that in fact defendant's cost of production of gypsum during said period had increased only 60c per ton, and there was thereupon refunded and paid back to plaintiff 12c per ton for all gypsum theretofore paid for by plaintiff at the rate of of \$4.48 per ton, and defendant thereupon reduced the price of \$4.48 per ton, hereinabove referred to, to \$4.36 per ton, effective as of November 13, 1946; that defendant's

cost of production of gypsum as determined by defendant was \$2.52 per ton during the 12-month period from July 1, 1944, to June 30, 1945, and was \$3.12 per ton during the 12-month period from July 1, 1945, to June 30, 1946, and that the said respective costs of production, and the resultant price of \$4.36 per ton hereinabove mentioned, were determined and established by defendant in accordance with the terms and provisions of said contract; that it is not true that the payments, or any of them, so made by plaintiff to defendant at the rate of \$4.36 per ton were in excess of the price properly chargeable by defendant under said contract by not less than 96c or any other amount per ton, or at all, and/or in the total sum of not less than \$6,911.34, or any other sum, or at all; that plaintiff has at all times been willing to pay 25c of said increase of 60c [151] per ton claimed by defendant.

For the period from February 1, 1947, to the date hereof, plaintiff has paid defendant at the rate of \$3.52 per ton for all gypsum delivered under said contract and has deposited and paid the further sum of \$.84 per ton into court, pursuant to the order of the above-entitled court for such deposit, dated March 14, 1947, as amended September 19, 1947.

13. That it is untrue that in violation of said contract or otherwise or at all, defendant has refused plaintiff access to defendant's books of account and/or records showing defendant's cost of producing gypsum, except that defendant has denied plaintiff access to certain portions of and en-

tries in defendant's books of account and records which contain detailed information of a confidential and secretive nature, and as to those portions and entries defendant offered to plaintiff to permit a reputable, disinterested, independent Certified Public Accountant to inspect said entries and records to ascertain the ultimate facts therein set forth, divorced from the details of a confidential and secretive nature relating to the production of products other than gypsum, and to permit such Accountant to convey to plaintiff any and all ultimate information therein contained pertaining to defendant's cost of producing gypsum; that plaintiff has failed to avail itself or to take advantage of such proposal.

14. That from time to time plaintiff has made deductions from the price of gypsum sold to plaintiff under said contract on the ground that such deductions were justified under the provisions of paragraph (5) of said contract, and defendant has asserted that of the deductions so taken by plaintiff \$2,165.10 were erroneous, unauthorized and contrary to the provisions of said paragraph (5); that by stipulation of the parties [152] filed herein on February 17, 1948, these conflicting claims and contentions were compromised and defendant did dismiss its First Counterclaim in the above-entitled cause. For that reason the Court makes no finding as to the propriety or impropriety of the deductions so taken by plaintiff.

15. That the allegations of paragraph 2 of plaintiff's third cause of action are true; that plain-

tiff's rights of refusal under paragraph (3) of said contract are separate and distinct, so that if plaintiff does not elect to refuse to purchase and accept in excess of 20,000 tons in any one calendar year, plaintiff may nevertheless refuse to purchase and accept in excess of 2,000 tons in any one month during such year; that in the latter event subject to defendant's right to sell the amount so refused for any purpose whatsoever, as in the third paragraph of said paragraph (3) provided, plaintiff remains obligated to purchase and accept from defendant the total amount of gypsum produced by defendant during such year, exclusive of quantities retained by defendant for chemical, pharmaceutical or scientific purposes as in paragraph (1) of said agreement provided, it being incumbent upon plaintiff, in such event, to designate during such year the month or months during such year when plaintiff will purchase and accept the gypsum so refused, if not sold by defendant.

16. That the gypsum which is the subject of said contract is fungible in nature; that at all times since said contract has been in effect the gypsum purchased by plaintiff has been delivered by defendant in bulk and has been stored in bulk by plaintiff from time to time in varying quantities up to 500 tons; that said contract provides for the sale of said gypsum from defendant to plaintiff f.o.b. Newark, California; that for the purpose of determining the conformity or non-conformity of gypsum so delivered to the specifications provided in paragraph [153] (5) of said contract, such gypsum should, in accordance with the

provisions of said contract, be analyzed from samples taken at the point of delivery and as of the condition of such gypsum at such point; that for the purpose of such analysis a composite sample of each shipment of gypsum made by defendant to plaintiff affords a fair and proper criterion of the gypsum delivered by defendant pursuant to said contract, and such method of sampling and analysis is in accordance with the terms and provisions of said contract; that the aggregate quantity of gypsum shipped by defendant from its Newark, California, plant, to plaintiff in the course of a 24-hour day shall constitute a "shipment" of such term is used hereinabove in this paragraph.

17. That the language of paragraph (5) of said contract means, and was intended by the contracting parties at the time of execution to mean, that in the event that the gypsum content falls below 95.51% plaintiff is entitled to deduct from the contract price of such gypsum the amount of 10c per ton for each full per cent, to the exclusion of fractional per cents, that the gypsum content falls below 97.51%, and plaintiff is not entitled to fractional deductions for fractional percentages.

18. That each of the counts alleged in plaintiff's complaint states a cause of action upon which declaratory relief may be granted.

19. That the cause of action alleged in the First Count of plaintiff's complaint herein is not barred by the provisions of Section 343 or Section 337, subdivision (1) of the Code of Civil Procedure of the State of California.

20. That upon motion of plaintiff duly made pursuant to Rule 67 of the Federal Rules of Procedure the Court, by order dated March 14, 1947, ordered that until further order of the Court plaintiff deposit with the Court the sum of 96c per ton [154] for all gypsum sold and delivered after January 31, 1947, by defendant to plaintiff under the said contract, such amount of 96c per ton being the difference between the \$4.48 per ton price of gypsum then claimed by defendant under said contract and the price of \$3.52 per ton which plaintiff was and is willing to pay to defendant under the terms and provisions of said contract for the period commencing November 13, 1946; that by order of the above-entitled Court dated September 19, 1947, there was refunded to plaintiff out of the sums theretofore deposited by plaintiff in court, pursuant to said order of March 14, 1947, an amount equal to 12c per ton on all gypsum delivered by defendant to plaintiff pursuant to said contract from February 1, 1947, to September 1, 1947, and paid for by plaintiff, through deposits in Court as aforesaid and payments directly to defendant, at the rate of \$4.48 per ton, and said order of September 19, 1947, further provided that the amount to be deposited in Court by plaintiff for all gypsum sold and delivered by defendant to plaintiff pursuant to said contract from and after September 1, 1947, was reduced from 96c per ton, as provided in said order of March 14, 1947, to 84c per ton.

CONCLUSIONS OF LAW

1. That the said contract dated January 29, 1937, between plaintiff and defendant is a valid and subsisting contract.

2. That the terms "cost of production" and "cost of manufacture" as used in paragraph (6) of said contract are synonymous and are not limited to "actual" or "direct" costs; that said terms "cost of production" and "cost of manufacture" include overhead expense and indirect charges which cannot be [155] directly charged to or against each of the various products produced by defendant at its Newark, California, plant, and which must, therefore, be allocated to or apportioned among such products on some reasonable basis.

3. That defendant's cost of production of gypsum as determined by defendant from time to time and the resultant increases in price established by defendant from time to time have been in accordance with the terms and provisions of said contract.

4. That plaintiff's rights of refusal under paragraph (3) of said contract are separate and distinct, so that if plaintiff does not elect to refuse to purchase and accept in excess of 20,000 tons in any one calendar year, plaintiff may nevertheless refuse to purchase and accept in excess of 2,000 tons in any one month during such year; that in the latter event, subject to defendant's right to sell the amount so refused for any purpose whatsoever, as in the third paragraph of said paragraph (3) provided. plaintiff remains obligated to purchase and accept from

defendant the total amount of gypsum produced by defendant during such year, exclusive of quantities retained by defendant for chemical, pharmaceutical or scientific purposes as in paragraph (1) of said agreement provided, it being incumbent upon plaintiff, in such event, to designate during such year the month or months during such year when plaintiff will purchase and accept the gypsum so refused, if not sold by defendant.

5. That for the purpose of determining the conformity or non-conformity to the requirements of paragraph (5) of said contract of gypsum sold and delivered by defendant to plaintiff pursuant to said contract such gypsum should, in accordance with the provisions of said contract, be analyzed from samples taken at the plant of defendant at Newark, California, and as of the condition of such gypsum at that point, [156] and for the purpose of such analysis a composite sample of each shipment of gypsum made by defendant to plaintiff affords a fair and proper criterion of the gypsum delivered by defendant pursuant to said contract, and such method of sampling and analysis is in accordance with the terms and provisions of said contract; that the aggregate quantity of gypsum shipped by defendant from its Newark, California, plant to plaintiff in the course of a 24-hour day shall constitute a "shipment" as such term is used hereinabove in this paragraph.

6. That the provisions of paragraph (5) of said contract mean that in the event that the gypsum content of gypsum sold and delivered by defendant

to plaintiff, pursuant to said contract, and determined as in the preceding paragraph hereof provided, falls below 95.51%, plaintiff is entitled to deduct from the contract price of such gypsum the amount of 10c per ton for each full per cent, to the exclusion of fractional per cents that the gypsum content falls below 97.51%, and plaintiff is not entitled to fractional deductions for fractional percentages.

7. That defendant's First Counterclaim, Second Counterclaim and Third Counterclaim be dismissed.

8. That plaintiff is not entitled to judgment against defendant for the sum of \$9,405.93, or any other sum.

9. That the respective parties shall pay their own costs.

It Is So Ordered and judgment shall be entered accordingly.

Dated this 26th day of April, 1948.

/s/ MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed Apr. 26, 1948. [157]

In the Southern Division of the United States District Court for the Northern District of California

No. 26,934-R

PACIFIC PORTLAND CEMENT COMPANY, a
California Corporation,

Plaintiff,

vs.

WESTVACO CHLORINE PRODUCTS CORPORATION, a Corporation,

Defendant.

JUDGMENT

The above-entitled cause came on regularly for trial before the Court sitting without a jury, and evidence both oral and documentary having been introduced, and the parties having stipulated to certain matters, and the case having been briefed and orally argued, and the cause submitted to the Court for decision, and the Court having heretofore made and caused to be filed herein its Findings of Fact and Conclusions of Law, and being fully advised, [158]

It Is Ordered, Adjudged and Decreed as Follows:

1. That that certain contract dated January 29, 1937, between plaintiff and defendant, a copy of which is attached to plaintiff's complaint herein as Exhibit "A" thereof, is a valid and subsisting contract.

2. That the term "cost of production" and "cost of manufacture" as used in paragraph (6) of said contract are synonymous and are not limited to

“actual” or “direct” costs; that said terms “cost of production” and “cost of manufacture” include overhead expense and indirect charges which cannot be directly charged to or against each of the various products produced by defendant at its Newark, California, plant, and which must, therefore, be allocated to or apportioned among such products on some reasonable basis.

3. That defendant’s cost of production of gypsum as determined by defendant from time to time and the resultant increases in price established by defendant from time to time have been in accordance with the terms and provisions of said contract, and such costs so determined by defendant and the resultant prices to which defendant became entitled were as follows:

Period	Cost of Production
From July 1, 1939, to June 30, 1940.....	\$1.66 per ton
From July 1, 1940, to June 30, 1941.....	1.34 per ton
From Jan. 1, 1942, to Dec. 31, 1942.....	1.93 per ton
From Jan. 1, 1943, to Dec. 31, 1943.....	2.71 per ton
From July 1, 1944, to June 30, 1945.....	2.52 per ton
From July 1, 1945, to June 30, 1946.....	3.12 per ton
Period	Price
From Oct. 5, 1941, to Sept. 4, 1946.....	\$2.98 per ton
From Sept. 4, 1946, to Nov. 13, 1946.....	3.76 per ton
From Nov. 13, 1946.....	4.36 per ton

4. That plaintiff’s rights of refusal under paragraph (3) of said contract are separate and distinct, so that if plaintiff does not elect to refuse to purchase and accept in [159] excess of 20,000 tons in any one calendar year, plaintiff may nevertheless refuse to purchase and accept in excess of

2,000 tons in any one month during such year; that in the latter event, subject to defendant's right to sell the amount so refused for any purpose whatsoever, as in the third paragraph of said paragraph (3) provided, plaintiff remains obligated to purchase and accept from defendant the total amount of gypsum produced by defendant during such year, exclusive of quantities retained by defendant for chemical, pharmaceutical or scientific purposes as in paragraph (1) of said agreement provided, it being incumbent upon plaintiff, in such event, to designate during such year the month or months during such year when plaintiff will purchase and accept the gypsum so refused, if not sold by defendant.

5. That for the purpose of determining the conformity or non-conformity to the requirements of paragraph (5) of said contract of gypsum sold and delivered by defendant to plaintiff pursuant to said contract such gypsum should, in accordance with the provisions of said contract, be analyzed from samples taken at the plant of defendant at Newark, California, and as of the condition of such gypsum at that point, and for the purpose of such analysis a composite sample of each shipment of gypsum made by defendant to plaintiff affords a fair and proper criterion of the gypsum delivered by defendant pursuant to said contract, and such method of sampling and analysis is in accordance with the terms and provisions of said contract; that the aggregate quantity of gypsum shipped by

defendant from its Newark, California, plant, to plaintiff in the course of a 24-hour day shall constitute a "shipment" as such term is used hereinabove in this paragraph.

6. That the provisions of paragraph (5) of said contract mean that in the event that the gypsum content of gypsum [160] sold and delivered by defendant to plaintiff, pursuant to said contract, and determined as in the preceding paragraph hereof provided, falls below 95.51%, plaintiff is entitled to deduct from the contract price of such gypsum the amount of 10c per ton for each full per cent, to the exclusion of fractional per cents, that the gypsum content falls below 97.51%, and plaintiff is not entitled to fractional deductions for fractional percentages.

7. That defendant's First Counterclaim, Second Counterclaim and Third Counterclaim be dismissed.

8. That plaintiff is not entitled to judgment against defendant for the sum of \$9,405.93, or any other sum.

9. That the respective parties shall pay their own costs.

Done in open court this 26th day of April, 1948.

/s/ MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed Apr. 26, 1948. [161]

[Title of District Court and Cause.]

Action for declaration of rights under a certain contract. Judgment as heretofore entered.

Pillsbury, Madison & Sutro, Eugene D. Bennett, Maurice D. L. Fuller, and Wallace L. Kaapcke, all of San Francisco, California, attorneys for plaintiff. Tadini Bacigalupi, Claude N. Rosenberg, Bacigalupi, Elkus & Salinger, all of San Francisco, California, attorneys for defendant.

MEMORANDUM OF OPINION

Roche, D. J.: In this action for declaratory relief the court is asked to construe a certain contract for the sale of [162] gypsum, with particular reference to Paragraphs (3), (5) and (6) thereof. Since paragraph (6)*, which contains the so-called "escalator price provision," presents the major disagreement,

*(6) In the event that California's cost of production of gypsum for any twelve (12) months' period during the term hereof shall increase five per cent (5%) above its average cost of production of gypsum for the preceding twelve (12) months' period, then and in that event California shall have the right, upon giving sixty (60) days' written notice to Pacific, to increase the price payable hereunder for gypsum thereafter delivered hereunder in an amount not to exceed the actual advance in California's cost of manufacture; provided that in no event may more than one such increase be made in any one calendar year.

California shall keep books of account and records showing its production cost of gypsum, and such books of account and records relating to the production cost of gypsum shall be open to inspection to Pacific at all reasonable times in order to enable Pacific to confirm the correctness of any advance in price permissible under this paragraph.

the court will devote the greater part of this discussion to that section of the contract.

The basic controversy between the parties is in the construction of the term "cost of production" as used in Paragraph (6). Plaintiff contends that it includes only the direct costs attributable to the production of gypsum and that price increases based on indirect as well as direct costs are not authorized by the contract. In this connection the complaint alleges, on information and belief, that certain payments, made under protest, were in excess of the price properly chargeable by the defendant under the contract.

Defendant makes two contentions: First, that the term "cost of production" is so indefinite as to render the contract void and second, in the event the court holds the contract valid, that the term should be construed to include not only direct costs but an allocation of indirect costs and general plant overhead.

The first question for decision is the validity of the contract and to determine this the court will look not only to the face of the contract but also to all attending circumstances, as disclosed by the evidence. [163]

The original contracting parties were plaintiff and California Chemical Company, defendant's assignor. The record discloses that in 1936 California Chemical was contemplating building a sea water magnesia plant at Newark, California, located on San Francisco Bay, and expected to extract gypsum and bromine as well as magesia. Because of the proximity of plaintiff's cement plant, California's then president, Stanley H. Barrows,

approached James H. Colton, plaintiff's vice-president, and suggested that plaintiff might be interested in buying this contemplated output of gypsum. Colton was receptive and on June 5, 1936, Barrows wrote to Colton, outlining briefly a proposed basis for such an agreement. As thus outlined the agreement would have covered other products besides gypsum and would have contained certain price protection clauses to guard against increases in labor, fuel and supplies, as well as a cancellation privilege on the part of California. Further informal negotiations followed the receipt of this letter and on September 18, 1936, Barrows sent Colton a draft of the proposed contract. This, too, covered several products and the price protection clause was again based on increase in direct costs and a right of cancellation was given to California. Colton refused the cancellation clause and insisted plaintiff alone be given such right. Barrows testified that this stand of plaintiff made it necessary for him to protect his company on the price and that he was no longer willing to limit cost to the items that had previously been enumerated. Further negotiation followed. Rather than attempting to enumerate all the items that might go to make up cost, the parties finally agreed on the term "cost of production" and that the cost records should be kept in accordance with proper and accepted accounting practice.

The formal contract, covering gypsum only, was signed on January 29, 1937, and was to run until January 31, 1962, subject, however, to cancellation

by plaintiff at any time during the first two years, upon giving of written notice, and any time after the first two years upon giving of one year's written notice. [164] Defendant Westvaco acquired California's rights almost immediately.

The record does not show what, if any, cost figures were utilized in fixing the basic contract price of \$2.80 per ton. Only a pilot plant was in operation at that time, defendant's commercial plant having been constructed later. Sale of the gypsum continued at the contract price until August 4, 1941, when defendant notified plaintiff that there had been an 18-cent-per-ton increase in cost of manufacture and that, in accordance with the provisions of Paragraph (6), the price would be increased to \$2.98 a ton. The record shows that early in October Colton and plaintiff's then accountant, one Canvin, visited defendant's plant for a conference to determine whether the \$2.98 price was justified. While Colton was being shown over the plant, Canvin and defendant's accountant went over the figures. The following day defendant's chief accountant wrote plaintiff as follows:

“In accordance with request of yourself and J. H. Colton, while in conference with Mr. Wallace yesterday, we have analyzed gypsum production costs for the years ending June, 1940, and June, 1941. We are attaching hereto a recapitulation of labor, material and power costs which accounts for 15c per ton of the 18c per ton increase of which you have been pre-

viously notified, and which increase is effective October 5, 1941.

“If you desire further information in re the attached statement, or in connection with our basis of determining increase in cost, please call on the writer.” (Emphasis the court’s).

Plaintiff paid the new price without protest and requested no further information.

There was no further price raise until January, 1944, when defendant notified plaintiff that there had been an actual increase in cost of manufacture of 78 cents and that the price per ton was accordingly being raised to \$3.76. Plaintiff replied with a request for a description of the accounting basis for each classification of cost and asked whether it had been consistently followed since the inception of the contract. Defendant stated that it had, and provided information showing an allocation of general plant overhead and indirect costs in addition to the direct costs of producing the gypsum. Plaintiff objected to such allocation and the resultant controversy culminated in this litigation. [165] The situation was not changed by a third price increase to \$4.62 per ton in November, 1946.

This is a long-term contract in which each party sought to protect itself. Plaintiff secured the sole cancellation right. Without a price protection clause defendant might well find the contract ruinous. Bearing in mind the background of negotiations and Barrow’s testimony, uncontradicted by

Colton, that he was unwilling to relinquish his cancellation right and at the same time limit his costs to those items directly chargeable to the gypsum production, it seems clear to the court that when the parties used the term "cost of production" they intended it to include all costs that might be shown by accepted accounting practice. The parties' conduct with reference to the first price raise supports this conclusion. It is difficult for the court to believe that plaintiff's accountant in checking over defendant's figures for the express purpose of determining whether a price increase was justified would ignore the fact that one-sixth of such increase resulted from an increase in indirect costs.

The term "cost of production" is indefinite only in the sense that its determination must be had by reference to defendant's accounting records. These, the contract provides and the evidence shows, are open to plaintiff. Applying the principle that "that is certain which may be made certain," the court holds that the contract is not invalid for uncertainty.

Much of the foregoing discussion is applicable to plaintiff's contention that "cost of production" refers only to "actual" or "direct" costs. This contention is based largely on the contract designation of gypsum as a "by-product," plaintiff taking the position that proper accounting practice charges to a by-product only those cost items incurred after its separation from the material of the main product. This position is not supported by the evidence, which shows that accepted accounting prac-

tice may charge to a by-product a proportionate share of indirect and overhead as well as the direct costs. Defendant has a uniform accounting system for all its plants. The record discloses that the cost [166] records, upon which price increases could be based, were to be kept in accordance with proper and accepted accounting practice. Since the plaintiff has failed to prove that defendant's records were not so kept and that the price raises, consequently, were unjustified, the court concludes that defendant's method of determining its cost of producing gypsum is in accordance with the terms of the contract.

The remaining two provisions the court is asked to construe are clear from the plain language of the contract. Paragraph (3) gives plaintiff the right to refuse to purchase and accept in excess of 2000 tons of gypsum in any one month, or 20,000 tons in any one year. Defendant maintains that if plaintiff fails to refuse in excess of 20,000 tons, it loses the right to refuse in excess of 2000 tons in any one month. Plaintiff treats these as separate and distinct rights. In the contract each is set forth in a separate paragraph; when both are referred to, it is in the disjunctive. Plaintiff's position is correct.

Paragraph (5) deals with the gypsum specifications and gives plaintiff the option, if the gypsum shall not be within 2 per cent of such specifications, either to refuse to accept and pay for such gypsum, or to accept it and pay therefor ten cents per ton less for each per cent which the said gypsum falls below such specifications. The question is

whether plaintiff may deduct a fraction of ten cents for each fractional per cent that the gypsum falls below the contract standard. The simple language of the contract requires a negative answer. This agreement was carefully drawn by able counsel. It seems obvious that if the parties had wished to allow fractional deductions for fractional percentages, the contract would have so specified.

Plaintiff has also asked the court to declare the proper method of taking gypsum samples for analysis. Since gypsum is shipped and stored in bulk, a composite sample taken from the aggregate quantity shipped each day will provide a fair analysis of the quality of such shipment. [167]

Findings of fact, conclusions of law and judgment have heretofore been filed. This memorandum has been prepared to indicate the reasons for the court's decision.

Dated: May 3, 1948.

MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed May 3, 1948. [168]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED
STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

Notice is hereby given that Pacific Portland Cement Company, the plaintiff above-named, hereby appeals to the Circuit Court of [169] Appeals for the Ninth Circuit from those portions of the final

judgment entered in the above-entitled cause on the 26th day of April, 1948, numbered and reading as follows:

“It Is Ordered, Adjudged and Decreed as Follows:

* * * *

2. That the terms ‘cost of production’ and ‘cost of manufacture’ as used in paragraph (6) of said contract are synonymous and are not limited to ‘actual’ or ‘direct’ costs; that said terms ‘cost of production’ and ‘cost of manufacture’ include overhead expense and indirect charges which cannot be directly charged to or against each of the various products produced by defendant at its Newark, California, plant, and which must, therefore, be allocated to or apportioned among such products on some reasonable basis.

3. That defendant’s cost of production of gypsum as determined by defendant from time to time and the resultant increases in price established by defendant from time to time have been in accordance with the terms and provisions of said contract, and such costs so determined by defendant and the resultant prices to which defendant became entitled were as follows:

Period	Cost of Production
From July 1, 1939, to June 30, 1940.....	\$1.66 per ton
From July 1, 1940, to June 30, 1941.....	1.84 per ton
From Jan. 1, 1942, to Dec. 31, 1942.....	1.93 per ton
From Jan. 1, 1943, to Dec. 31, 1943.....	2.71 per ton
From July 1, 1944, to June 30, 1945.....	2.52 per ton
From July 1, 1945, to June 30, 1946.....	3.12 per ton

Period	Price
From Oct. 5, 1941, to Sept. 4, 1946.....	\$2.98 per ton
From Sept. 4, 1946, to Nov. 13, 1946.....	3.76 per ton
From Nov. 13, 1946.....	4.36 per ton
* * * *	

5. That for the purpose of determining the conformity or non-conformity to the requirements of paragraph (5) of said contract of gypsum sold and delivered by defendant to plaintiff pursuant to said contract such gypsum should, in accordance with the provisions of said contract, be analyzed from samples taken at the plant of defendant at Newark, California, and as of the condition of such gypsum at that point, and for the purpose of such analysis a composite sample of each shipment of gypsum made by defendant to plaintiff affords a fair and proper criterion of the gypsum delivered by defendant pursuant to said contract, and such method of sampling and analysis is in accordance with the terms and provisions of said contract; that the aggregate quantity of gypsum shipped by defendant from its Newark, California, plant, to plaintiff in the course of a 24-hour day shall constitute a 'shipment' as such term is used hereinabove in this paragraph. [170]

6. That the provisions of paragraph (5) of said contract mean that in the event that the gypsum content of gypsum sold and delivered by defendant to plaintiff, pursuant to said contract, and determined as in the preceding paragraph hereof provided, falls below 95.51%, plaintiff is entitled to deduct from the contract price of such gypsum the amount of 10c per ton for each full per cent, to the exclusion of fractional per cents, that the gyp-

sum content falls below 97.51%, and plaintiff is not entitled to fractional deductions for fractional percentages.

* * * *

8. That plaintiff is not entitled to judgment against defendant for the sum of \$9,405.93, or any other sum.

9. That the respective parties shall pay their own costs.”

Dated: San Francisco, California, the 25th day of May, 1948.

/s/ PILLSBURY, MADISON &
SUTRO,

/s/ EUGENE D. BENNETT,

/s/ MAURICE D. L. FULLER,

/s/ WALLACE L. KAAPCKE,

Attorneys for Plaintiff.

[Endorsed]: Filed May 25, 1948. [171]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents, That we, Pacific Portland Cement Company, a California corporation, [172] as principal, and Associated Indemnity Corporation, as surety, are held and firmly bound unto Westvaco Chlorine Products Corporation, a corporation, in the sum of two hundred and fifty dollars (\$250) to be paid to the said Westvaco Chlorine Products Corporation, for the payment of which, well and truly to be made, we bind ourselves, our successors and assigns, by these presents.

Sealed with our seals and dated this 25th day of May, 1948.

Whereas on the 26th day of April, 1948, a judgment was entered in the above-entitled cause by the District Court of the United States for the Northern District of California, Southern Division, and Pacific Portland Cement Company has filed in the said court a notice of appeal from certain portions of said judgment to the United States Circuit Court of Appeals for the Ninth Circuit;

Now, Therefore, the condition of this obligation is such, that if the aforesaid judgment is affirmed or modified by the appellate court, or if the appeal is dismissed, and Pacific Portland Cement Company shall pay all costs which may be awarded against it on said appeal, then this obligation to be void; otherwise to remain in full force and effect.

[Seal] **PACIFIC PORTLAND
CEMENT COMPANY,**
Principal.

By /s/ C. B. FLICK,
Vice President.

[Seal] **ASSOCIATED INDEMNITY
CORPORATION,**
Surety.

By /s/ JACK C. POOLE,
Attorney in Fact.

Attest:

/s/ SCHOENING, Asst. Secretary.

[Certificate of Acknowledgment by Jack C. Poole attached.]

[Endorsed]: Filed May 25, 1948. [173]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF CON-
TENTS OF RECORD ON APPEAL

Pursuant to Rule 75 of the Federal Rules of Civil Procedure, Pacific Portland Cement Company, appellant, upon an [174] appeal herein to the Circuit Court of Appeals for the Ninth Circuit, hereby designates to be contained in the record on appeal the complete record and all the proceedings and evidence in the action; including inter alia the following:

1. Complaint;
2. Motion and Notice of Motion for Order for Deposit in Court, together with Memorandum of Points and Authorities, and Order Shortening Time for hearing of said motion;
3. Order for Deposit in Court dated March 14, 1947;
4. Answer;
5. Plaintiff's Reply to Counterclaims;
6. Interrogatories Propounded to Defendant;
7. Reply to Interrogatories Propounded to Defendant by Plaintiff;
8. Motion and Notice of Motion for Order Compelling Further Answers to Interrogatories;
9. Motion and Notice of Motion for Production, Inspection and Copying of Documents;
10. Order for Refund out of Deposit in Court and for Reduction of Further Deposits, dated September 19, 1947;
11. Further Reply to Interrogatories;

12. Amendment to Plaintiff's reply to Counterclaims;

13. Motion and Notice of Motion for Production, Inspection and Copying of Document, including Memorandum of Points and Authorities.

14. Order for Discovery, Inspection and Copying of Documents, dated December 1, 1947.

15. Notice to Produce Original Documents, dated December 4, 1947. [175]

16. Stipulation for Compromise and Dismissal of Defendant's First Counterclaim;

17. Order for Entry of Judgment, dated March 30, 1948;

18. Motion and Notice of Motion for Order Terminating "Order for Deposit in Court" and Authorizing Withdrawal and Payment to Defendant of Money on Deposit;

19. Draft of Judgment Presented by Defendant, and Plaintiff's Objections thereto;

20. Draft of Judgment Presented by Plaintiff, and Defendant's Objections thereto;

21. Plaintiff's Proposed Findings of Fact and Conclusions of Law;

22. Findings of Fact and Conclusions of Law Proposed by Defendant.

23. Plaintiff's Proposed Amendments to Defendant's Draft of Findings of Fact and Conclusions of Law;

24. Plaintiff's Proposed Modification of Defendant's Draft of Judgement;

25. Defendant's Proposed Amendment of Findings of Fact and Conclusions of Law Prepared by Plaintiff;

26. Findings of Fact and Conclusions of Law;
27. Judgment;
28. Stipulation and Order re Payments under Contract and re Stay of Judgment;
29. Memorandum Opinion, dated May 3, 1948;
30. Notice of Appeal with date of filing;
31. Bond for Costs on Appeal;
32. This Designation of Contents of Record on Appeal;
33. The Reporter's Transcript of the evidence and [176] proceedings at the trial of the cause;
34. All exhibits marked for identification or received in evidence at the trial of the cause;
35. The depositions of Stanley H. Barrows, taken October 25, 1947; of James H. Colton, taken October 24, 1947, and L. O. Bannard, taken November 1, 1947;
36. Stipulation for Transmittal of Original Exhibits;
37. Clerk's Certificate.

Dated: San Francisco, California, the 8th day of June, 1948.

/s/ PILLSBURY, MADISON &
SUTRO,

/s/ EUGENE D. BENNETT,

/s/ MAURICE D. L. FULLER,

/s/ WALLACE L. KAAPCKE,

Attorneys for Plaintiff and
Appellant.

(Acknowledgment of Service attached.)

[Endorsed]: Filed June 10, 1948. [177]

[Title of District Court and Cause.]

STIPULATION FOR TRANSMITTAL OF
ORIGINAL EXHIBITS

It is hereby stipulated by the parties hereto that all the exhibits marked for identification or received in evidence [178] in the above-entitled cause, all the depositions, and the reporter's transcript of the evidence and proceedings at the trial shall be transmitted by the clerk in their original form to the Circuit Court of Appeals for the Ninth Circuit as part of the record on appeal, in lieu of copies thereof.

Dated: San Francisco, California, June 8, 1948.

/s/ PILLSBURY, MADISON &
SUTRO,

/s/ EUGENE D. BENNETT,

/s/ MAURICE D. L. FULLER,

/s/ WALLACE L. KAAPCKE,

Attorneys for Plaintiff.

/s/ BACIGALUPI, ELKUS &
SALINGER,

/s/ CLAUDE N. ROSENBERG,

/s/ TADINI BACIGALUPI,

Attorneys for Defendant.

It Is So Ordered.

MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed June 10, 1948. [179]

[Title of District Court and Cause.]

ORDER UNDER RULE 73(g) EXTENDING
TIME FOR FILING RECORD ON APPEAL
AND DOCKETING ACTION

Whereas plaintiff, Pacific Portland Cement Company, on May 25, 1948, filed herein a written notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit from [180] certain portions of the final judgment of this court entered into this action on April 26, 1948;

Now, Therefore, good cause appearing therefor, it is hereby Ordered, under Rule 73(g) of the Federal Rules of Civil Procedure, that the time for the docketing of this action in the United States Circuit Court of Appeals for the Ninth Circuit and for the filing of the record on appeal herein be and it is hereby extended to ninety (90) days after the filing of said notice of appeal, that is to say, to and including August 23, 1948.

Dated: July 1st, 1948.

MICHAEL J. ROCHE,
United States District Judge.

The foregoing order may be entered by consent.

/s/ BACIGALUPI, ELKUS &
SALINGER,
Attorneys for Defendant.

[Endorsed]: Filed July 1, 1948. [181]

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 26934 R

PACIFIC PORTLAND CEMENT COMPANY, a
California Corporation,

Appellant,

vs.

WESTVACO CHLORINE PRODUCTS CORPO-
RATION, a Corporation,

Appellee.

ORDER EXTENDING TIME TO FILE REC-
ORD ON APPEAL AND TO DOCKET
APPEAL

Upon the application of appellant, Pacific Portland Cement Company, and the stipulation and affidavit filed therewith, and good cause appearing therefor, it is hereby Ordered that the time for filing in this court the record in the above-entitled cause (the action bearing Civil No. 26934-R in the District Court of the United States for the Northern District of California, Southern Division), and the time for docketing the appeal herein, be and it is hereby extended to and including September 30, 1948.

Dated: August 13, 1948.

WILLIAM DENMAN,

Senior Circuit Judge.

A True Copy. Attest: Aug. 1, 1948. Paul P. O'Brien, Clerk. Frank H. Schmidt, Deputy.

[Endorsed]: Filed August 14, 1948. Paul P. O'Brien, Clerk.

[Endorsed]: Filed August 18, 1948. C. W. Calbreath, Clerk. [182]

District Court of the United States, Northern
District of California

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 182 pages, numbered from 1 to 182, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Pacific Portland Cement Company, a California Corporation, Plaintiff, vs. Westvaco Chlorine Products Corporation, a Corporation, Defendant, No. 26934-R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$30.90 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 29th day of September, A.D. 1948.

[Seal]

C. W. CALBREATH,
Clerk. [183]

In the Southern Division of the United States District Court for the Northern District of California

Before: Hon. Michael J. Roche, Judge.

No. 26,934-R

PACIFIC PORTLAND CEMENT COMPANY, a
California Corporation,

Plaintiff,

vs.

WESTVACO CHLORINE PRODUCTS CORPORATION, a Corporation,

Defendant.

REPORTER'S TRANSCRIPT

Monday, December 8, 1947

Appearances—For Plaintiff: Messrs. Pillsbury, Madison & Sutro, by Eugene D. Bennett, Esq. and Wallace L. Kaapcke, Esq.

For Defendant: Messrs. Bacigalupi, Elkus & Falinger, by Tadini Bacigalupi, Esq. and Claude N. Rosenberg, Esq., and Kenneth Ray, Esq. [1*]

Mr. Bennett: May we stipulate that the Reporter prepare a daily transcript and that the cost of the original copy of the transcript which will be furnished to Your Honor be taxed as cost in the case?

Mr. Rosenberg: So stipulated.

The Court: Very well. We will take an adjournment until 2:00 o'clock this afternoon.

(Whereupon an adjournment was taken until 2:00 o'clock P.M. of the same day.) [26]

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

C. BRUCE FLICK,

called as a witness on behalf of the plaintiff; sworn.

Mr. Bennett: Well, your Honor, I think a little more knowledge of these matters would be helpful, and I would like to read the deposition, offer in evidence and read the deposition of James S. Colton, a former executive of the Pacific Portland Cement Company, which was taken by the other side.

Mr. Rosenberg: I will object to the reading of the deposition of the witness that is taken as an adverse witness purely for the purpose of discovery. The proper foundation has not been laid. I don't know where Mr. Colton is. I know he is an officer of the company, he should be available.

Mr. Bennett: Will you step down, Mr. Flick?

Mr. Bennett: Mr. Kaapcke, will you take the stand?

WALLACE KAAPCKE,

called as a witness on behalf of plaintiff; sworn.

The Clerk: Will you state your name?

A. Wallace Kaapcke.

Direct Examination

By Mr. Bennett:

Q. Mr. Kaapcke, you are an attorney at law admitted to practice in the Supreme Court of the State of California and this court?

A. Yes. [44]

Q. Associated with the firm of Pillsbury, Madi-

(Testimony of Wallace Kaapcke.)

son & Sutro, counsel for the plaintiff in this case.

A. Yes.

Q. Do you know Mr. James H. Colton?

A. I do.

Q. The same James H. Colton, whose deposition was taken on Friday, October 24, 1947, in this case?

A. That is the person you refer to.

Q. Do you know where Mr. Colton resides?

A. He resides in Reno, Nevada.

Q. Do you know whether he is there at this time?

A. He is there at this time.

Q. Have you had communication with him during the last 24 hours?

A. I talked to him yesterday afternoon on the telephone and he was then at his home in Reno.

Q. Did he say anything at that time with reference to his intention to be in Reno, Nevada?

A. He said that he would be in Reno all week, all of this week.

Q. Did you communicate or did you endeavor to communicate with Mr. Colton today?

A. Within the half hour I tried to reach him at either his home or his office in Reno, but the report back from the Long Distance operator was that he was away from his office for a short period and would be there when exactly she did not know, [45] but some further time during the afternoon.

Q. During this afternoon?

A. Yes.

Mr. Bennett: That is all, Mr. Kaapcke.

(Testimony of Wallace Kaapcke.)

Cross-Examination

By Mr. Rosenberg:

Q. Mr. Kaapcke, what is Mr. Colton's position with Pacific Portland Cement Company?

A. I know only from what he said when he testified at his deposition. I understand that as an active employee he is retired, but he still maintains the position and title of vice president, and a member of the board of directors.

Q. When you spoke to him yesterday did you ask him if he would come to San Francisco for the purpose of testifying in this trial?

A. I asked him if he were able to come, what his arrangements were about coming down here, and he said he was not able to make a reservation on the train.

Q. Did he say he would be willing to come if you wanted him here?

Mr. Bennett: Well, there is no question of that, counsel. I object to the question. It is not a matter of whether he is willing to come. If the court would evidence the desire of Mr. Colton coming here, appearing in person, we can obtain Mr. Colton. He is an elderly man and is retired from all active work with the plaintiff corporation, and has some little [46] business, wholesale building supply business up in Reno. That is and has been for some time his home. The only reason I put this witness on the stand was to answer any question of the application of the rules that would permit the reading of this testimony in evidence. This

(Testimony of Wallace Kaapcke.)

was a deposition, it is true, that was taken by the defendant. However, the rules provide that a deposition of this kind can be read or put in evidence at the time of the trial by either party. Now, Mr. Colton is more than 100 miles away from the court. In view of the fact this deposition is largely cross-examination by the others, it does seem to me the defendant wouldn't in any way be prejudiced by the reading of this deposition in evidence. I know of no rule of law that would exclude it, and particularly as this witness has shown to the court now that Mr. Colton is more than 100 miles away from the place of court.

Mr. Rosenberg: If the Court please, it is my understanding that this is a deposition that was taken at the instance of the defendant, who examined Mr. Colton as an adverse party. As a result, we were entitled to inquire into anything that was relevant to the issues of the case, and the deposition was taken, as I say, for the purpose of discovery. The witness is an officer, vice president and member of the board of directors of the corporation, and if his testimony is to be elicited in this case he is available, I believe it should be done by direct examination and then cross-examination, based [47] upon the direct, and not cross-examination under the adverse witness rule, where we inquire into a lot of things and to which I would make objection if the testimony were elicited in the course of this trial, and it is the first time I have heard of a deposition of an adverse witness

(Testimony of Wallace Kaapcke.)

being offered in evidence by the other side. We are not bound by the testimony.

Mr. Bennett: You may not be bound by this testimony, but we are entitled to offer it. Counsel has stated nothing, your Honor, that I know of by reason of law why this deposition is not admissible in evidence as such, subject, of course, to any motion that may be made or objection that may properly be taken to any question or answer that is given.

Mr. Rosenberg: May I just consult the rules for a minute? I think it is clear under the rule, I am referring to Rule 26(d) which says:

“At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present, or represented at the taking of the deposition, or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.” [48]

Obviously that is not the purpose.

“(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director or managing agent of a public or private corporation, partnership, or association which is a party may be used by an adverse party for any purpose.”

(Testimony of Wallace Kaapcke.)

We are the adverse party, so it obviously does not come under that.

“(3) The deposition of a witness, whether or not a party, may be used by any party for the purpose if the court finds: 1, that the witness is dead; or, 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or, 3, that the witness is unable to testify because of age, sickness, infirmity, or imprisonment; or, 4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or, 5, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

“(4) If only part of a deposition is offered in evidence [49] by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.”

Now, I submit that a party is free to take a deposition under the discovery rules and then it is up to him to determine whether he is going to offer that deposition in evidence, and where the witness is an officer and a director of the corporation that is a party, unless they can show that the witness is not available, and then I am not sure that they

(Testimony of Wallace Kaapeke.)

can produce that deposition that was taken by the parties as an adverse witness. This is the first time I have ever been up against this, if the Court please, but I think it is logical and under the rule it is apparent if the witness is available they can bring him in. There may be questions I want to ask him. This deposition was not taken, necessarily, for the purpose of using it in evidence. It was taken purely for the purpose of discovery.

Mr. Bennett: Well, you run that risk, Mr. Rosenberg. As I read the rule, we still entitled ourselves——

The Court: Read the rule that you rely on.

Mr. Bennett: This is Rule 26, subdivision (d) (3):

“The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, that the witness is dead, or, 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, [50] unless it appears that the absence of the witness was procured by the party offering the deposition; or, 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment, or, 4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena.”

It seems to me that under this rule there has been no showing that we have purposely procured the absence of the witness from the jurisdiction of

(Testimony of Wallace Kaapcke.)

the court. I think there are some cases on this. Rather than delay the matter, at this juncture I would rather defer the deposition and put on Mr. Flick so we can go on with the trial. My purpose in offering the deposition, which was a deposition taken where cross-examination was permitted under the rules and they could not very well complain of that. Your Honor recalls when you were out in the Superior Court under 2055, I know it was always a practice of George Ford, who took the deposition of an adverse party, why, he would always read that deposition in evidence, and the practice has been so well established, and nobody ever objected to it. Step down, Mr. Kaapcke. Perhaps by tomorrow morning I can supply your Honor with authorities on that.

C. BRUCE FLICK,

recalled.

The Clerk: Will you state your name?

A. C. Bruce Flick. [51]

Direct Examination

By Mr. Bennett:

Q. What is your position with the plaintiff, Pacific Portland Cement Company?

A. I am a vice president, and I am also the secretary and treasurer.

Q. How long have you held that position?

A. I have been secretary-treasurer of the company since June of 1944, and I have been a vice president since May, 1945.

((Testimony of C. Bruce Flick.))

Q. Before that, what was your position?

A. With Pacific Portland Cement Company, I went with Pacific Portland Cement Company the 1st of July, 1942, as an assistant to the president, and the first of July, 1943, I became controller and continued as controller until June, 1944.

Q. I am going to back up a moment, your Honor, and ask the witness for his preliminary and previous experience, to qualify him, as he happens to be a certified public accountant.

Q. Will you relate briefly, Mr. Flick, for the benefit of his Honor, the training and experience you have had in the business world, including your particular course of studies, if any, at a university or college?

A. I went to the University of California, graduating in the class of 1922 with the degree of Bachelor of Science in Commerce, with a major in accounting. One of my instructors there was John F. Forbes, who was quite a well-known accountant in San Francisco, and at that time Mr. Forbes was the Pacific Coast [52] partner of Haskins & Sells.

Q. After leaving college——

A. After leaving college, after I graduated, Mr. Forbes gave me my first employment in public accounting with Haskins & Sells. I continued with Haskins & Sells for a couple of years, and then I became accountant for the Construction Company of North America, and in March of 1925 I became secretary of the Old Mission Portland

(Testimony of C. Bruce Flick.)

Cement Company, and had charge of the accounting. In July, I think it was, 1927, I left the Old Mission Portland Cement Company and went with the American Trust Company, and companies affiliated with American Trust. I was with the Stock and Bond Affiliate, the American National Company. I was secretary of the American Company which owned the American Trust Company, which in turn was owned by Goldman Sachs, of New York. I was secretary and had charge of accounting and finance and legal matters of a number of companies affiliated with the American Trust Company.

In June of 1936 I became assistant treasurer of the Hawaiian Pineapple Company, and continued as assistant treasurer up until 1940 when I was assigned to Honolulu by the Hawaiian Pineapple Company as controller, as well as assistant treasurer. I resigned from Hawaiian Pineapple Company and came back to San Francisco three months after the attack on Pearl Harbor, and then after a short vacation I went with Pacific Portland Cement Company. [53]

Q. After you became employed by Pacific Portland Cement Company did you become familiar with the contract between Pacific Portland Cement Company and the California Chemical Company, whose property and plant at Newark were later taken over by the defendant, Westvaco Chlorine Products Corporation, the contract of July 29, 1937, providing for the sale of gypsum?

A. Yes, I became quite familiar with that contract.

(Testimony of C. Bruce Flick.)

Q. What did you have to do, or, rather, what was the relation of your duties to anything pertaining to that contract?

A. One of my duties as controller, after I became controller in July, 1943, one of my duties was to see to it that when the company had a contract that it obtained whatever benefits it was entitled to under the contract, and also that it performed whatever obligations it had by way of follow-up.

Q. You were not employed by the company at the time of this first price increase, or notice of price increase which was dated in August, 1941, to be effective October 5, 1941?

A. No, I was not employed in 1941.

Q. You became aware, however, shortly after your employment, of the fact that the contract price of \$2.80 had been increased to the sum of \$2.98 by reason of claimed increased costs of the manufacture of—actual increased costs of the manufacture of gypsum?

A. Yes, I became aware when I first went into the Pacific Portland Cement Company of the fact we were paying \$2.98 a ton [54] at the time.

Q. I show you here a copy of a letter at the top of which is stated, "Westvaco Chlorine Products Corporation, Newark, California, October 2, 1941," addressed to Pacific Portland Cement Company, 417 Montgomery Street, San Francisco, California, Attention A. H. Canvin, Secretary, and purports to be signed by Westvaco Chlorine Prod-

(Testimony of C. Bruce Flick.)

ucts Corp., O. H. Hurlbert, Chief Accountant, and ask you whether you shortly after you became employed by the company saw the original of that letter, and its attached sheet or schedule that is attached to that copy.

A. Yes, I have seen the original of which this appears to be a copy.

Q. They were in the files of the Pacific Portland Cement Company?

A. Yes, they were in Mr. Canvin's files.

Q. You saw this in 1942, did you?

A. I would say probably in 1943, possibly in 1942.

Q. Was it prior to any further notice of price increase that you were apprised of the contents of this letter of October 2, 1941, and its accompanying tabulation and list?

A. Was it prior to further——

Q. Prior to the second——

A. The second price increase, we were given verbal intimation in the latter part of 1943 that Westvaco's costs were going up [55] and that we could expect they would demand an increase in price and they actually made such a demand about the 1st of January, 1944.

Q. Was it before or after that that you first saw this letter from Mr. Hurlbert, giving the details of that first increase of 18 cents per ton?

Mr. Rosenberg: I understood the witness has said it was in 1942 or 1943. This is a letter of 1944.

The Witness: No, no. This is a letter of 1941.

(Testimony of C. Bruce Flick.)

Mr. Rosenberg: But you are talking about was it before or after the notice of increase which was in the letter of January 14, 1944?

The Witness: I believe I was asked whether I first saw this 1941 letter before or after the notice in January, 1944.

Mr. Bennett: That's right.

Mr. Rosenberg: You were first asked when you saw it and you said 1942 or 1943. Is that right?

Mr. Bennett: Yes; that was my understanding, but to be sure about it, you saw this letter of October 2, 1941, from Mr. O. H. Hurlbert, either in 1942 or 1943.

A. I think it was in 1943, but at any rate it was in the file of the company, in Mr. Canvin's files, and whenever I went into his files in general reference to the Westvaco contract I have no doubt I saw that particular letter.

Mr. Bennett: I would like this letter to be offered in [56] evidence at this time as plaintiff's exhibit.

The Court: Admitted and marked.

(The letter was marked Plaintiff's Exhibit 1 in evidence.)

The Court: It is time for a recess.

(Recess.)

Q. (By Mr. Bennett): Mr. Flick, I fear I have failed to ask you, you are a certified public accountant, are you not, as such by training?

A. Yes, I am. I have been a certified public accountant since about 1925 or '26.

(Testimony of C. Bruce Flick.)

Mr. Bennett: Your Honor, this letter has been referred to. I would like to read it for the record. This is the letter from the defendant concerning the details of this first increase of 18 cents. The date of it is October 2, 1941.

“In accordance with request of yourself and J. H. Colton, while in conference with Mr. Wallace yesterday, we have analyzed gypsum production costs for the years ending June, 1940, and June, 1941. We are attaching hereto a recapitulation of labor, material and power costs which accounts for 15 cents per ton of the 18 cents per ton increase of which you have been previously notified, and which increase is effective October 5, 1941.

“If you desire further information in re the attached statement, or in connection with our basis of determining increase in cost, please call on the writer. [57]

“Yours very truly,

“WESTVACO CHLORINE
PRODUCTS CORP.,

“O. H. HURLBERT,

“Chief Accountant.”

Attached to the letter is a sheet entitled, “Gypsum Manufacturing July, 1939-June, 1941,” showing the two respective periods; July, 1939, to June, 1940, the cost per ton of these three items, which we conceded and told your Honor were direct and proper items of cost, and for the period July, 1940, to July, 1941, it shows at the bottom a total cost for these three items referred to of

(Testimony of C. Bruce Flick.)

15 cents per ton, broken down to 2 cents increase in labor, 10 cents increase in material, and 3 cents increase in power.

GYPSUM MANUFACTURING

July, 1939—June, 1941

		Labor	Material	Power
1939	July	595.71	187.36	259.86
	August	522.25	99.07	196.41
	September	712.57	212.74	249.90
	October	551.29	155.35	230.82
	November	629.07	288.98	222.69
	December	757.34	271.54	102.03
1940	January	555.05	210.13	197.82
	February	656.41	324.74	280.90
	March	885.76	377.33	388.13
	April	684.51	348.09	280.43
	May	776.73	370.54	265.20
	June	1,019.47	545.03	389.82
Total		8,346.16	3,390.90	3,064.01
Tons Produced 27,685: per ton (.30)			(.12)	(.11)
1940	July	702.68	290.69	308.62
	August	629.77	269.07	302.64
	September	864.02	234.17	409.38
	October	864.42	466.64	285.98
	November	765.49	990.02	327.12
	December	971.85	1,115.50	418.33
1941	January	1,120.64	1,310.28	290.06
	February	797.56	292.09	349.56
	March	945.41	876.01	420.68
	April	655.73	426.02	351.61
	May	771.64	295.11	388.09
	June	1,276.99	339.26	473.42
Total		10,366.20	6,904.86	4,325.49
Tons Produced 32,000: per ton (.32)			(.22)	(.14)
Increase .15		(.02)	(.10)	(.03)

(Testimony of C. Bruce Flick.)

Q. Mr. Flick, what was your understanding when you first saw this letter, this letter and the attached memorandum of compilations, the attached memorandum, as far as whether there was any charge for or claimed charge for items other than direct cost of manufacture?

Mr. Rosenberg: I object to that as incompetent, irrelevant and immaterial, the document speaks for itself. I don't think we are particularly concerned with this individual's understanding in reference to that. He can testify as to what he received and what was written him by Westvaco, or anything of that sort, but I don't see the pertinency or the materiality of the mental understanding of this witness. [58]

Mr. Bennett: I can answer that very directly. As counsel stated to you, they are defending on the theory that there was an estoppel, and the notice of the first raise of 1941 of 18 cents which included both direct and indirect charges, and we went ahead and paid on that notice, thus recognizing what would amount to construction of the accounts as contended for by the defendant. The letter, itself, shows quite on the contrary, there is nothing in the letter that in any way suggests or intimates that there is any indirect charge included in this 18 cents. On the contrary, it shows that the 15 cents of the 18 cents was all for direct costs, and which we have not disputed. I want to show your Honor at this time that Mr. Flick, who had taken over the operation of the plaintiff corpora-

(Testimony of C. Bruce Flick.)

tion in so far as this contract was concerned, understood that there was nothing, and there was nothing to make him understand to the contrary that this 18 cents was anything other than direct costs of manufacture——

The Court: Well, I suggest that you develop the facts; what, if anything, he did in relation to this document. Your question was a compound question.

Mr. Bennett: Perhaps my question was not in good form, if the court please.

Q. Did you have any knowledge at the time that you first had in charge or had to do with the pricing or operations of the contract in issue, this contract of January 29, 1937, as to [59] whether prior to that time, in August, 1941, when the first price raise was claimed by the defendant, or up to the time you first took charge of the matter, as you have testified, that there had been any claim made by the defendant in this 18-cent price raise for increased indirect costs?

A. Well, when I first looked into this contract and reviewed the contract to familiarize myself with it and then examined whatever files were available in connection with the contract which Mr. Canvin, as Secretary and Treasurer had in his office, the only thing that Mr. Canvin had in his file was these direct figures for labor, material and power, and he had nothing in his files to show any general allocations of overhead, or any indirect charges or anything of that kind. The price had gone up

(Testimony of C. Bruce Flick.)

from \$2.80 to \$2.98, and there was an 18-cent increase. Here was a statement that showed a 15-cent increase in these direct charges. I understood from Mr. Canvin that——

Mr. Rosenberg: Just a moment.

The Court: What you understood may go out.

The Witness: May I say, I discussed with Mr. Canvin——

Mr. Bennett: You can say you discussed it with Mr. Canvin, but counsel is objecting to anything Mr. Canvin said to you.

The Witness: You mean I am not permitted to say what Mr. Canvin told me?

The Court: In the legal terms, that is hearsay evidence.

The Witness: Well, going over the files, that is something actual which I did, was to examine the files that were available [60] in connection with the contract, and in going over the files it was all I found in the way of a statement of the figures; that stipulated a price, in other words, of 18 cents. There was nothing in the files about any overhead charges, or any indirect charges or anything of that sort. I found nothing in the files to show any further details had been furnished or had been requested than 15 cents of the 18 cents was for these direct charges.

Mr. Rosenberg: May I have the question read? I take it the answer is "No."

(Question read by the reporter.)

The Witness: I had no knowledge they were

(Testimony of C. Bruce Flick.)

claiming anything on overhead or that there were any items of overhead involved, or that there were any items of overhead in the 18-cent figure.

Q. (By Mr. Bennett): When was the first time you had any knowledge or intimation of any kind that the defendant claimed or asserted that their first increase of 18 cents included anything other than the direct items of charges for the manufacture of gypsum?

A. Well, the first time I had any information was when I first examined figures at Westvaco's plant in January, 1944. At that time I examined their figures for 1943, and 1942, and having nothing in our files comparable to what they were then showing me, this one with a lot of overhead allocations in 1943 or 1942, I asked them to furnish me the similar figures [61] for the previous period, so I could see whether they made changes, apparent changes in their accounting method, or not, and I think it was in January, 1944, that is the first time I knew they were claiming to have it on the books. I never examined their books.

Q. At that time you were willing to pay that price for increased cost even based on \$2.98?

A. They claimed that their costs had gone up.

Q. You mean after the first price?

A. After the first price, increase of 18 cents. That price was \$2.98 that was being paid when I came back in the cement company in 1942 and continued to be paid through 1942 and 1943. The OPA had gone into effect on most commodities and set

(Testimony of C. Bruce Flick.)

March, 1942, ceiling prices. The OPA took over control and froze the price at 2.98. They claimed the costs had gone up in 1942 and 1943. I went down there in January, 1944, and examined their figures they presented to me, and I tried to look at the basis of indicating their labor and power and natural gas, fuel, direct costs of producing, which indicated to me that they were entitled to an increase of 29 cents on account of these two charges.

Q. 29 cents above the \$2.98 price?

A. Yes.

Q. That you had been paying?

A. Yes. I personally would proceed to recommend a price of \$2.98 [62] plus 29.

Q. Or \$3.27?

A. So with the OPA having already frozen their price at 2.98 we could not pay the \$3.27 even though we wanted to, and they could not receive it even though they wanted it. There was no object at that time in going back and trying to reopen the 2.98 price. [62-a]

Mr. Rosenberg: I am going to object to this form of testimony, Your Honor. This is not responsive to any question. I want to know what question he is answering now.

Mr. Bennett: I am trying to get the facts in without asking little short questions. The witness is now testifying in answer to your contention that we had been advised that there were indirect charges paid without any opposition. The witness is testifying as to what he did and why.

(Testimony of C. Bruce Flick.)

The Court: Proceed. Reframe your question. The Reporter left or I would have him read the question and answer.

Q. (By Mr. Bennett): As I understand it, then, until you were advised in 1944 that they were claiming an increase based upon indirect items of cost as well as the 29 cents direct cost, which you are willing to accept, you had not had any knowledge or intimation of any kind or character that the defendant had claimed at any time or was claiming at any time or was asserting that any indirect cost should be included in the price that you should pay for this gypsum?

A. I had no knowledge of their claims of indirect cost and overhead and so forth until I went down there and made the examination in January, 1944.

Q. The total claim of that second price raise was 78 cents, was it not, Mr. Flick?

A. 78 cents, that is correct. They claimed a price of \$3.76.

Q. Now, you found there was a 29-cent item of direct charge. [63] What were the so-called items of indirect charge? Do you have any record or memorandum of that?

A. Well, I have here, if I am permitted to refer to them, to refresh my memory on these figures, working papers which I made at their place at the time. May I refer to these?

Q. These working papers that you say you are now referring to were notes made by you at the

(Testimony of C. Bruce Flick.)

time or shortly after the time you had this conference with the defendant's representatives in 1944?

A. Yes, these are the notes I made at the time in Westvaco's office.

Q. All right.

Mr. Rosenberg: I am not going to make any objection, if the Court please, on the ground it is not the best evidence, as obviously the books are. I might say this, that prior to trial I had discussed with counsel the best means of expediting the trial of this case without bringing in original records and documents, and I am perfectly willing to waive the best evidence rule where I know, as I do know, that Mr. Flick has gone over our records and has made worksheets, but I have not received any reply from counsel, and I am hopeful I will be accorded the same privilege. I think that is a logical and expeditious way to elicit this testimony, but I do not want it to work one way. I would like it to work both ways.

Mr. Bennett: If your Honor please, all this witness is [64] talking about is, he asked whether he could refresh his recollection as to what they claimed or told him at the time.

The Court: He is entitled to refresh his recollection.

Mr. Bennett: That is all.

Q. By the way, Mr. Flick, when you were down there, you did not make an audit of their books, did you?

A. I did not.

(Testimony of C. Bruce Flick.)

Q. Did they offer to let you make an audit of their books?

A. When I first went down they showed me some working sheets containing some figures which purported to be taken from their books. I did not go back and audit their books, check their vouchers, check all the journal entries and everything because I assumed that the figures they were showing me were in fact taken from the books, as they said they were, and I assumed they were honest in their accounting and so forth. I assumed they were not padding the accounts for the purpose of the contract or anything of the sort. So I did not go down there with the idea of doing a lot of checking back of vouchers, original vouchers and that kind of thing, and I did no such checking. They furnished me figures and I took those figures and I discussed those figures.

Q. The figures that they furnished you for this 78 cents claimed increase, you have already stated that the 29 cents you agreed to as being actual or direct cost or the manufacture of gypsum; will you tell the Court what those items amount to and [65] what they cover?

A. The 29 cents?

Q. Yes.

A. The 29 cent increase in direct charges was the difference, the increase from 1942 direct charges of 71 cents to the 1943 direct charges of \$1.00. There was an increase of 29 cents in the direct charges. Those direct charges consisted of operating labor, repair labor, which they told me was

(Testimony of C. Bruce Flick.)

labor on the drying and grinding machinery for the gypsum after it had been precipitated and filtered out, operating labor, materials and supplies for the grinding and drying machines for the gypsum after it had been filtered out, the fuel oil and natural gas required to heat the drier for the gypsum after it had been filtered out, the power required to run the grinding machinery for the gypsum after it had been filtered out, and the workmen's compensation insurance and social security taxes directly relating to the operating labor and repair labor charge, and water necessary in the processing of the by-product gypsum. So those items together aggregated for 1942 71 cents; for 1943, \$1.00, an increase of 29 cents in the direct charges.

Did you ask me also the other items?

Q. Yes. Now, the indirect items that they sought to claim, which amounted to the difference between 29 cents and 78 cents, or 49 cents. What were they, Mr. Flick?

A. The first item is depreciation, which went up from 38.4 [66] cents in 1942 to 45.4 cents in 1943, an increase of 7 cents per ton of gypsum on depreciation. I received no detail on the depreciation because I was informed that the figures were kept in New York and they had no detailed figures here.

The insurance of 1 cent in 1942 and 1.7 cents in 1943, an increase of .7 of a cent per ton.

Taxes, real and personal property taxes, 1.5 cents in 1942; 1.9 cents in 1943, an increase of .4 of a cent.

Laboratory production control and research, 10.5

(Testimony of C. Bruce Flick.)

cents in 1942; 30.4 cents in 1943, an increase of 19.9 cents.

General plant expense, 17.4 cents in 1942; 27 cents in 1943, an increase of 9.6 cents.

Engineering and maintenance supervision, 2.2 cents in 1942, 3.7 cents in 1943, an increase of 1.5 cents.

Purchasing and stores, 2.3 cents in 1942, 4.9 cents in 1943, an increase of 2.6 cents.

Accounting, 4.8 cents in 1942, 7 cents in 1943, an increase of 2.2 cents.

Overhead, 4.9 cents in 1942, 9.3 cents in 1943, an increase of 4.4 cents.

Q. (By Mr. Bennett): That was the item of overhead?

A. Called overhead. I subsequently asked for the detail on that, which I obtained, but these were the initial figures that made up that increase.

Those items altogether were grouped, the item called overhead, [67] the item of laboratory production control and research, general plant expense, engineering and maintenance supervision, purchasing and stores, accounting and overhead, called overhead, those items together aggregated in 1942 42.1 cents, in 1943 82.3 cents, or an increase of 40.2 cents. So that summarizing, we had 28.9 cents for the direct charges—I called that 29 cents a few minutes ago, rounding it out—8.1 for depreciation, insurance and taxes, 40.2 cents for all these overhead items, and .1 of a cent for bittern. Their figures, I may say, do not show

(Testimony of C. Bruce Flick.)

that. They just show 29 cents. There is apparently no increase in bittern. All those items added together show an increase; adjusting for fractions you get a figure of 78 cents, as claimed by them.

Q. Were you told at that time or subsequently how or why those particular amounts of overhead or general or indirect charges were listed in the amounts they listed? A. They told me——

Mr. Rosenberg: May I have the foundation laid so we will know with whom he was talking?

Mr. Bennett: Yes.

Q. To whom were you talking at that time?

A. I went to the Newark plant office of Westvaco in company with Mr. Canvin, who was secretary-treasurer, and Mr. Wallace C. Riddell, who was our chemical engineer at that time, to examine these figures, and we talked with Mr. W. K. Wallace, the [68] Western manager of Westvaco, whose office is at Newark, and with a Mr. Vernon Cuneo, who was their accountant, and I think they called him plant office manager, and the information was given me as to the accounts by Mr. Cuneo and Mr. Wallace, as I recall, was present during all my conversations with Mr. Cuneo.

Now, these charges to overhead were stated to me to be made in accordance with their uniform national accounting system, which is prescribed by their New York office, and which the Newark office carries out, and the basis for allocating these various overhead items is prescribed for them in this uniform national system which Westvaco Chlo-

(Testimony of C. Bruce Flick.)

rine Products Corporation, I was told, follows through in their plants in West Virginia and elsewhere on the Atlantic Coast, elsewhere on the West Coast, and at Newark.

Q. Were you given any details as to why they allocated a certain percentage of overhead or indirect charges to this? Any basis for making such allocations?

A. They allocated their overheads because that is the way they were told to do it by their New York office. They stated that they considered that correct accounting under their uniform system to allocate these overheads to the products that they made.

Q. You were not able at the time to ascertain from their books and records, and assuming that any allocation of so-called indirect or overhead was appropriate in this case, whether the [69] amounts allocated or made were in accordance with the actual operation or they were the result of some arbitrary rule of thumb or other accounting technique.

A. Many of the items which they allocated, of which they allocated a portion to the gypsum production, quite obviously did not arise out of the drying and grinding of this byproduct gypsum. There was one item of new products research for which they charged gypsum, I believe it was, 11 cents a ton, and I could not see how in the world they could justify charging 11 cents a ton to this byproduct gypsum for the allocation of new prod-

(Testimony of C. Bruce Flick.)

ucts research. Their research laboratory was working on products that were completely foreign to gypsum. But that was part of their uniform national accounting system. They charged everything, and so they charged new products research. I could elaborate on that if you wish.

Q. Well, please.

A. Because, for example, they had put on a number of plant guards down there. They had heavy watchman expense because they were making products—this ethylene di-bromide—and they had in one section of their plant a defense plant corporation unit plant which is now being advertised for sale by the Defense Plant Corporation, where they were producing a catalyst for making synthetic rubber, and they had a contract with the Rubber Reserve Corporation. Due to these critical or wartime critical products, they had put on plant protection. They had [70] put on guards and watchmen——

Mr. Rosenberg: Just a minute, Mr. Flick, I want to know what he was told. This witness is giving a lot of conclusions and observations.

Mr. Bennett: I will qualify that, counsel.

Q. Were you told these things when you were down there?

A. I was told everything I am relating. I did not imagine any of this.

Q. Go ahead.

A. So the byproduct gypsum was charged a share of all of this plant protection and whatnot

(Testimony of C. Bruce Flick.)

and the upkeep of the plant grounds. They have a very nice plant down there. It is very beautifully kept. They have nice lawns, shrubbery and flowers, and the production of this byproduct gypsum is charged its proportion of all of that.

Q. That is, you mean they sought to charge it in this second price raise?

A. Yes, they charged it so on their books and so told me that they kept their books that way. They charged plant accounting, the cost of book-keeping; they charged a portion of that to this byproduct gypsum; they charged a portion of purchasing expense, their engineering expense. They charged a portion of their New York office expense. They charged a portion of their West Coast expense, West Coast general expense, West Coast general supervision, West Coast telephone and telegraph, New York office [71] expense, exploration—a portion of exploration is charged to the drying and grinding of this byproduct. Subscriptions and donations, production cost control, cost accounting and statistics, personnel department expense, taking care of Selective Service deferments, and so forth, and hiring new employees. I might say in this case I am now relating I took notes in my conversations with Mr. Cuneo. I made a pencilled carbon copy at the time I noted these things in my conversation and I left with Mr. Cuneo the carbon copy so that subsequently we would have no misunderstanding as to what he told me and what I took away with me.

(Testimony of C. Bruce Flick.)

Group insurance. So their general principle, as prescribed under their uniform accounting system, was to allocate a portion of this byproduct gypsum of every kind of overhead and indirect expense.

Q. The first time, however, that you knew that that was their policy was when you went down to the plant and had this first talk with Mr. Cuneo in 1944?

A. That is correct. That is the first time that I found out what they were charging on their books.

Q. But up to that time there was nothing in your files or in your dealings with the Westvaco people or with your own associates in Pacific Portland Cement Company that indicated in any way that at any time Westvaco had claimed or were claiming the right to increase its price under this contract by any [72] increase of price in these so-called indirect items of the character that you have mentioned?

A. I had absolutely no information as to all of this detail, which I obtained for the first time when I went there in January, 1944, and on subsequent requests for information, which they furnished.

Q. To be certain now, Mr. Flick, that was the first time that you had any knowledge or intimation that Westvaco contended or claimed the right to make an increase in price because of any such so-called indirect charge?

A. That is correct.

(Testimony of C. Bruce Flick.)

Mr. Rosenberg: Mr. Bennett, you yourself have so testified. I submit the question has been asked and answered three times. It is leading and suggestive and argumentative.

Mr. Bennett: I did not mean to transgress the rule there, but you complained before that the witness was not answering specifically and categorically the questions I asked, and I thought I might anticipate the objection by asking these questions.

Mr. Rosenberg: That does not answer the objection.

The Court: It is fair to say that they are slightly leading and suggestive.

Mr. Bennett: Maybe it was, but I did that, Your Honor, with the idea that it could overcome what I anticipated might be another comment from counsel. [73]

A. May I add just one more thing from my notes as to what Mr. Cuneo told me about their accounting?

Q. Yes.

A. Mr. Cuneo stated to me that they were not charging to the byproduct gypsum any cost of any of the processing previous to the point of separation of the byproduct gypsum.

Q. Subsequently and after you had a chance to go over those figures and review the matter again, did you raise any question with the defendant Westvaco as to the propriety of these charges totaling 49 cents for the items, indirect and otherwise, that you have mentioned here?

(Testimony of C. Bruce Flick.)

A. We raised a question almost immediately. I may say at the time I examined the figures at Newark in my capacity as controller, my job on that occasion was to get the information and not to raise questions and enter into questions with them. I was purely there for the purpose of fact finding, to get the information and come back and report to my superiors, and Westvaco gave us a letter, I believe, dated January 14, 1944, informing us their costs had gone up 78 cents and after March 15, 1944, the new price would be \$3.76, and they requested, because the OPA price controls would prevent any such price increase, they requested us to join them in applying to the OPA for an increase in the maximum price from \$2.98 to \$3.76.

I talked with Mr. Wallace of Westvaco on January 26, 1944, by telephone, and Mr. Wallace told me that they wanted us to [74] join with them in the OPA application, and I asked him what form they visualized our participation in it would take, and he said that they wanted to get us to write a letter to the OPA saying we would not object to the increase because it was justified under this escalator clause in our contract, and I said that it might be all very well to ask OPA for authority for a maximum price of \$3.76, but we had some questions as to the accounting charges, and even though a 78 cent increase might be the maximum to be asked from OPA, that we would have to determine what lesser price would be proper. Under

(Testimony of C. Bruce Flick.)

OPA regulations you could always charge a lesser price than the maximum. Then on February 4 we wrote a letter to Westvaco in which we set forth in writing that Westvaco had shown us that this 78 cents was composed of direct cost, 29 cents, and these other items, and we raised the question in that letter as to the propriety of these other charges.

Q. Now, so we can get some of the letters in evidence which you have mentioned,—(to Mr. Rosenberg), have you seen this letter of the 14th?

Mr. Rosenberg: Yes.

Mr. Bennett: I will offer in evidence a letter of January 14, 1944, from Westvaco Chlorine Products Corporation to Pacific Portland Cement Company, informing us in writing of this claimed increase of 78 cents.

The Court: Let it be admitted and marked. [75]

Mr. Bennett: I understand counsel would be willing to have us substitute a copy for that one.

(The letter referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 2.)

Mr. Bennett: I have no objection to marking this original and substituting a copy tomorrow. The witness has explained in substance this letter, their claim for an increase of 78 cents per ton. I would like it in the record. Does your Honor wish it read or shall it be deemed read?

The Court: You may read it into the record if you wish.

(Testimony of C. Bruce Flick.)

Mr. Bennett: Your Honor would like it read in the record?

The Court: I have no choice in the matter: whatever you wish.

Mr. Bennett: This is a letter on the letterhead of Westvaco Chlorine Products Corporation, Newark, California, January 14, 1944.

“Pacific Portland Cement Company

417 Montgomery Street,

San Francisco, California

“Gentlemen:

“Referring to that certain agreement dated the 29th day of January, 1937, wherein Pacific Portland Cement Company, a California corporation, is party of the first part, and California Chemical Company, a Delaware Corporation, was party of the second part, and which said agreement was subsequently [76] assigned by California Chemical Company, a Delaware Corporation, to Westvaco Chlorine Products Corporation, a Delaware corporation, and which said agreement covers the sale of gypsum to Pacific Portland Cement Company, in accordance with its terms, you are hereby advised that the average cost of the production of gypsum by the undersigned, Westvaco Chlorine Products Corporation, for the twelve-month period commencing January 1, 1943, and ending December 31, 1943, was more than five (5) per cent above its average cost of production of gypsum for the preceding twelve-month period commencing on the 1st day of January, 1942, and ending on the

(Testimony of C. Bruce Flick.)

31st day of December, 1942. The actual advance in Westvaco Chlorine Products Corporation's cost of production of gypsum for the twelve-month period commencing January 1, 1943, and ending December 31, 1943, over the twelve-month period commencing January 1, 1942, and ending December 31, 1942, was seventy-eight (78) cents per ton.

"Pursuant to the terms of Paragraph 6 of the agreement hereinabove referred to, you are hereby given sixty (60) days notice in writing, that commencing on the 15 day of March, 1944, the price to be charged you and the amount to be paid by you for all gypsum delivered to your company by the undersigned, pursuant to the terms of said agreement hereinabove referred to, will be at the rate of Three and 76/100 (\$3.76) Dollars per ton, said payment to be made in the manner set out in said agreement. [77]

"You are advised that an application will be made to the Office of Price Administration for an order confirming and authorizing the above increase in price.

"You are further advised that the books of account and records of the undersigned corporation relating to its production cost of gypsum will be open to your inspection at all reasonable times.

"Yours very truly,

"WESTVACO CHLORINE
PRODUCTS CORPORATION,

"By W. K. WALLACE,
"Western Manager."

(Testimony of C. Bruce Flick.)

Q. Was that letter received before or after you had talked with Mr. Wallace and Mr. Cuneo down at the plant?

A. That letter, dated January 14, giving us the notice, was dated the same day that we were in fact at the plant making this examination.

Q. You had not received that letter before you went to the plant?

A. No, we had not. Wallace had told us earlier that the costs were up and to expedite things we went down and we were there on the same day, January 14. Their letter is dated January 14.

Q. Mr. Flick, you have stated that you objected to this 49 cents for indirect items, some of which you mentioned, and told them that you were willing to pay the direct or actual costs in the sum of \$.29 without verifying the matter on their books. State to the Court why it was that you objected to the [78] increase of these indirect items of 49 cents.

A. We objected to the 49 cents overhead allocations and indirect charges because in our view it was absolutely incorrect accounting for them to charge as costs of producing this byproduct gypsum any of these overhead and indirect items. We have a product which is a waste product, and in order to give it value they have to dry it and grind it and put it on freight cars. As that gypsum is actually something they have to get rid of in order to make magnesium oxide, the sulphate is an impurity. They can't have sulphates and cal-

(Testimony of C. Bruce Flick.)

cium going into the manegisum oxide, at least not very much of it.

Mr. Rosenberg: Just a moment. Is this witness testifying as an expert?

Mr. Bennett: Well, I will consider him as an expert. He is stating his reasons.

Mr. Rosenberg: I am not going to consider him a chemical expert unless he qualifies as such. I think it is presumptuous for this accountant to testify as a chemist, and I ask that he be qualified if he is going to express such opinions.

Mr. Bennett: I would like at this time—I can do that, too, perhaps——

Mr. Rosenberg: Go ahead.

Mr. Bennett: I would like at this time to clear up one matter, Your Honor. During the opening statement of defendant's counsel, he stated among other things that this contract that [79] they lived with, acted under, and wanted to act under, at least we did, and they did on their own terms, for a period of some ten years, was invalid. He also says that this is not a byproduct. As a matter of fact, the contract defines it. The contract says:

“California contemplates the erection of a plant located on Canal Head at Newark, California, primarily designed to produce magnesium oxide in its various forms, which plant will produce as a byproduct substantial quantities of gypsum.” I think the witness need not qualify as a chemical expert to say that this is a byproduct because the parties in their contract have said it was a byproduct.

(Testimony of C. Bruce Flick.)

Mr. Rosenberg: I will stand on my objection that when the witness gets into a discussion of chemistry and what can or cannot be done in the chemical process involved in a chemical plant, he has not been qualified.

The Court: That testimony in relation to the language of that question may go out.

Mr. Bennett: Your Honor, I would like to ask this question at this juncture:

Q. So we can avoid possible objections, did you ever visit the plant down there at Newark, Mr. Flick?

A. Yes, I visited the plant in January, 1944.

Q. Were you shown over the plant and explained the details of its operation? [80]

A. Yes, I was shown over the plant by Mr. W. K. Wallace, their western manager.

Q. At that time did Mr. Wallace explain to you and tell you what the manufacturing cost——

Mr. Rosenberg: Don't be leading. I do not like to object all the time, but——

Mr. Bennett: You are right. I will withdraw the question.

Q. State what Mr. Wallace said to you, if anything, in connection with the operation, the process and operation then being carried on at the Newark plant of the Westvaco Corporation.

A. Well, we went out and looked over the plant itself. We looked at the different pieces of equipment. We looked at the tanks where the gypsum was precipitated and the unit where the gypsum

(Testimony of C. Bruce Flick.)

was dried and ground. We looked at the bins where it was stored. We looked at the loading facilities. We walked over the plant, and he just generally explained what went on in the different units, the different machines, and so forth. We had with us Mr. Wallace Riddell, who was our chemical engineer, and when we got back from the trip, I said, "Wallace, I would like to have a memorandum of the process and the equipment, and you are better qualified than I. I wish you would write it up," which he did, and I have a copy of it in my cost file, because you can't decide what is good accounting unless you understand what happened. Accounting is supposed [81] to record facts.

Mr. Rosenberg: Is that his qualification, Mr. Bennett, as a chemical expert?

Mr. Bennett: I am not contending he was a chemical expert. He was not professing to be a chemical expert, as I understood it. He may have said something about chemistry but the Court has stricken that out.

The Witness: I have to have an understanding of the processes in general in order to determine as to the accounting, and Mr. Riddell gave me that understanding. Mr. Wallace gave it to me in general terms. I have read magazine articles on it. I have read an article by Dr. Seaton. I think he said it was a byproduct in his magazine article.

Q. (By the Court): You would not care to qualify as a chemical expert, would you?

A. No, sir. [82]

(Testimony of C. Bruce Flick.)

Q. (Mr. Bennett): You spoke of an article by Dr. Seaton that you had read concerning this operation down there. Will you point out the article and describe in what publication it appeared, Mr. Flick?

A. Dr. Seaton wrote an article on a process in "Chemical and Metallurgical Engineering," November, 1931, and in this article he described in general the process, and he says, "The by-product gypsum from the process, through the operation of favorable location factors is marketable at a profit instead of being a valueless waste."

Q. Who is Dr. Seaton?

A. Dr. Seaton is the executive vice president of Westvaco Chlorine Products Corporation.

Q. And he was formerly connected with the predecessor in interest, the California Chemical Company?

A. He was with California Chemical Corporation at the time he wrote this article entitled, "Bromine and Magnesium Compounds Drawn From Western Bays and Hills," containing a flow sheet and a diagram of their then operation at Newark, which was essentially the same as the subsequent and present operation.

Q. Except as to size?

A. Except as to size. The basic chemistry is in articles, text-books and one thing and another.

Mr. Bennett: Is there any question, Counsel, that Dr. Seaton, the executive vice president of the

(Testimony of C. Bruce Flick.)

Westvaco Chemical Company, wrote this article the witness has referred to?

Mr. Rosenberg: I do not doubt it for one moment.

Mr. Bennett: I would like to offer that article in evidence at this time, your Honor. I will offer it in evidence in the form of a photostat that we have prepared from the publication, itself. I will give counsel a copy of that.

The Court: Indicate so the record is clear the purpose of this offer. It is offered to prove what?

Mr. Bennett: It is to prove, your Honor, several things: The character of operation, the method of manufacturing gypsum, the steps advised and the admission by a present officer of the corporation that gypsum is a by-product and unless processed by grinding, drying and shipping it is a waste product.

Mr. Rosenberg: We do not question that, your Honor.

The Court: That is just what I was going to suggest. There does not seem to be any question about it being a by-product.

Mr. Bennett: Counsel stated he did not accept that in his opening statement.

Mr. Rosenberg: I said nothing of the kind. I said it may be a by-product from a chemical production standpoint, but for accounting purposes it does not make a particle of difference whether it is considered a by-product or a joint product. I am sure that was my statement.

(Testimony of C. Bruce Flick.)

Mr. Bennett: Another reason, your Honor, there is an issue [84] here as to sulphuric acid, counsel made to you. Dr. Seaton, the head technical man of this defendant corporation, states here that this sulphuric acid is necessary for the manufacture of the principal product, magnesium oxide, that they now seek to charge entirely to this by-product. I think it is important in the sense that it is an admission by the senior executive of this defendant corporation that this charge that they have sought to make for sulphuric acid against this by-product gypsum is improper.

The Court: This is off the record.

(Discussion off the record.)

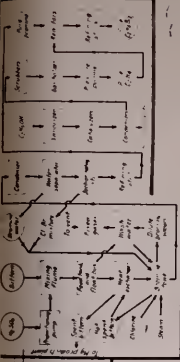
Mr. Bennett: Your Honor did not rule on the matter of this article?

The Court: No. There hasn't been any objection made so it will be admitted and marked.

(The magazine article referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 3.)

Right: Flow Sheet of Bromine-Dibromide Production in the Plants of the California Chemical Corp.

Below: From Crystallizing Ponds
Such as This, Used by the Arden Salt
Co. for Solar Salt Production, the
Mother Liquor or Sea Water Brine
is Drawn for the Extraction of Bro-
mine and Magnesium Chloride



Bromine and Magnesium Western Bays and

On to the healthy youngsters in the growing chemical industry of the Pacific Coast is the California Chemical Co., a member of the Sierra Pacific group. This organization is particularly notable in generating its own background in being built entirely on a background of raw materials peculiar to the West Coast. Thus, although a controlling interest in this company is held by United Chemicals, it is in no sense a branch of an eastern operation as its materials, processes and products, taken as a whole, are with but a few exceptions not duplicated east of the Rockies.

In examining the established and expanding of a closely related group of industries the connection between cause and effect is sometimes difficult to trace. In this case, it may not be immediately apparent why the low quality of plastic calmed magnesium from foreign sources after the War should logically have resulted in the genesis of the second largest bromine producer in this country by 1920. Yet the steps are plain enough. In 1920, poor magnesium quality forced the largest consumer in this community, the California Chemical Co., into acquiring its own bromine plant, thus assuring its own supply of the substance in California with the resulting incorporation of the Sierra Magnesium Co. In 1925 demand for an accessory raw material (tungsten-mum chloride) became as acute in the West as to warrant the establishment of another organization—the California Chemical Corp.—to supply this product. This, latter concern has gradually expanded its operations to include the manufacture and other outputs from tungsten and other valuable raw materials. As a result, in basic raw material. As a result, its activities have augmented those of

parent and of its sister industry, and accordingly, will be first discussed, and in greater detail.

Practically all of the common salt consumed on or shipped from the Pacific Coast is produced by the solar evaporation of sea water. A solar salt operation requires for its success the combination of availability of a large acreage of land of moderate value, a constant in the ocean or an ocean bay, and an essentially constant high level of a climate with high rates of evaporation and low rainfall, almost zero permeability, and a location reasonably adjacent to principal markets. The required happy combination

is found in only two localities in the west, both in California, and hence salt production is primarily centered on the southeast border of San Francisco Bay, with a smaller operation near the southern tip of San Diego Bay and one on the west shore of San Francisco Bay. Solar salt production, formerly attempted by a host of small operators, has now chiefly passed into the hands

of these concerns, which supply Pacific Coast and export markets with all of the commercial grades of salt, to years past, although remedial efforts had been made to recover values that had been lost from these operations, the sea water bittern in which such values are concentrated had normally been thrown away. It is this sea water bittern on which the processes of the California Chemical Corp. are based in supplying being obtained through long term contracts from the three principal salt brine producers. The view at the left above shows crystallizing ponds operated by one of these producers.

In solar salt production, sea water, introduced through tide gates into immense shallow earthen ponds is gradually brought to saturation with salt through long exposure to the weather. As concentration proceeds, the brine is forwarded from pond to pond, finally being pumped to earth-bottomed "crystallizers" in which further evaporation takes place. The greater part of the salt deposits the greater part of the salt as coarse crystals. When crystallization

San Francisco Bay. This locality has much more to recommend it than the near availability of a raw material, namely, transportation facilities, and, shortly, deep water docks. A mild climate, making plant testing essentially unnecessary at any time, permits the use of economical buildings and avoids the need for protecting the plant pipes from freezing. Thanks to Florace Greeley, labor of unusual intelligence is abundantly available even in normal times. Excellent fresh water occurs in shallow gulches, while cooled salt water is available, for free, from the plant. It is only a short distance from the principal natural-gas line entering San Francisco, and as a result natural gas, costing even less than the cheap fuel oil available in the West, is used as a primary fuel. A high-voltage transmission line, through the plant property, makes hundreds of kilowatts available as raw material. These features give some indication of the some-

	Bromine			
	100 lbs.	25 lbs.	10 lbs.	5 lbs.
Per Can				
NaCl	14.8	3.7	1.5	0.7
KCl	1.2	0.3	0.1	0.05
MgCl ₂	0.1	0.02	0.01	0.005
CaCl ₂	0.1	0.02	0.01	0.005
Fe	0.1	0.02	0.01	0.005
Sum	16.3	4.2	1.7	0.8

1135,000,000 gal. Surprisingly little rain water by winter rains is observed. Rain water floats on top of the heavy brine and evaporates off during fair weather without having appreciably mixed with the underlying liquor.

Recovery of bromine from brine is carried on at all three plants of the California Chemical Corp. The process is a modification of the Kubiushsky system, largely used in Germany, but altered to fit the particular raw material used and to employ typically American equipment. A flow sheet of the process is included at the Newark plant which shows the steps involved in the preparation of ethylene dibromide, appears on the second page preceding. It can be briefly described as follows: Raw brine has a slight and variable alkalinity, which makes its further processing difficult. Accordingly, from the storage ponds it is pumped to a large square tank, from which it passes as a controlled stream into which the necessary quantity of caustic soda is added to give a proportioning neutralizing liquor. This liquor is then pumped into a tank which has to be concrete resistant, which holds several days' plant supply. From these reservoirs the neutralized brine is drawn off on an elevated supply tank. It next flows, by way of a constant-level float box which insures absolute regularity of feed, to the bromine separation towers, being warmed in transit by passage through a heat exchanger, counter-current to the tower liquor.

The bromine towers are square hollow towers, built of granite or soapstone plates, and filled with a ceramic packing designed to give intimate contact between gas and liquid. Brine enters from the top, and the bottom, chlorine gas at an intermediate point. When the proportions of these three materials are in proper balance a hot, practically bromine-free liquor escapes at the bottom, while bromine vapor, plus a little chlorine and some water vapor, is expelled through an opening near the top of the tower. This vapor mixture goes to a steamware condenser, the condensed water is separated by gravity from the crude liquid bromine, and this latter has its chlorine content removed and returned to the tower system by distillation in a purified feed stream. Bromine is further purified from traces of organic matter in a continuous distillation system, and is then ready for marketing as purified bromine or for conversion into bromine compounds. All bromine containing

vapors and liquids appearing at any stage of the process are returned to the main bromine towers. Final fixed gases escaping from the tower are washed free from bromine by cold water in a small steamware wash tower. Three bromine towers, each capable of taking a feed of 2,000 gal. of brine hourly, are installed at Newark, with a single tower each at Chula Vista and San Mateo. Bromine recoveries of 95 per cent or better are regularly realized.

All three plants are equipped to manufacture ethylene dibromide from the pure liquid bromine which is the initial product. To this end, pure ethylene gas is prepared by dehydrating alcohol by passage over a suitable catalyst, the water being carried off chemically and the gas being purified by chemical scrubbing to a product of extreme high purity. Ethylene is then contacted with pure bromine at low pressure in a glass-and-steamware system, reaction between the two components being ready and complete. The ethylene dibromide resulting requires further treatment for removal of reaction by-products, and is then ready for marketing, being shipped in steel drums or tank cars. The Newark plant is being equipped to manufacture the usual organic bromides.

Exit liquor from the bromine recovery towers is, essentially, the same composition as the raw brine with the exception that it is small bromine content has been replaced with ethylene. Some 3 per cent dilution by condensed steam also has occurred. Both Newark and Chula Vista plants process this liquor for magnesium chloride recovery. The step involves the concentration of the brine in multiple effect, sub-type vacuum evaporators. Solutions of the evaporated liquor (in both coolers at Chula Vista; continuous coolers at Newark) gives an essentially pure, saturated solution of magnesium chloride, which is separated from magnesium sulphate, potash, and residual sodium salts by settling and centrifuging. The magnesium chloride solution is further evaporated in open pans until it has the composition $MgCl_2 \cdot 6H_2O$, and this hot liquid is chilled to give solid, flake or powdered commercial magnesium chloride.

Other Salts Now Recovered

The present magnesium chloride market which can logically be served by a Fraction Coast plant will absorb but a fraction of the total magnesium values present in the brine now being received, present quantity is regularly increasing as full consumption of the West Coast brines grows. Consequently, after extensive geological investigation and some two years' pilot operation, a small plant for recovery of these values in other forms is now in production and a large plant is being

engineered. Likewise, the method employed is that of conversion of soluble magnesium values to magnesium hydroxide through reaction with lime, and further processing of this magnesium hydroxide. This scheme can claim no novelty in conception, as it has been repeatedly suggested for the treatment of Stauffert residues and for Michigan and Ohio River brines. Particularly favorable raw material costs, recent development of markets for certain products, and some substantial advances in operating technique make such treatment feasible as a major addition to a complete discussion of the various steps of the process is lacking, but its essentials are shown in the right-hand flow sheet on the preceding page.

Unfortunately, aside from the general economic features of cheap raw and operating materials and favorable location, the magnesium-value recovery process rests on the developed ability to prepare a high-purity magnesium hydroxide which settles readily and can be filtered readily. Settling rates of several feet per hour, filter cakes on a rotary vacuum filter 2 in. thick, and filter-cake water content only slightly over 50 per cent represent values believed to be unique in the handling of magnesium hydroxide, ordinarily considered as a slimy, slow-settling precipitate filterable only on a leaf filter, if at all. Development of the desired properties has been in part due to an elaborate study of process conditions, but in even greater measure to the recognition of the fact that the properties of the product are dependent to a considerable extent on certain characteristics of the lime employed, and on the finding of methods for obtaining these characteristics.

No detailed review of the products shown on the last-mentioned flow sheet is possible at this time. Magnesium basic carbonate is a well-known product, with established markets, some of which, however, are still susceptible to a considerable expansion. Magnesium sulphate, from hydrolysis of a magnesium chloride solution, is a commercial product, and technical plastic calcium magnesium oxide, and because of its excessive fineness, high purity, and low cost, finds a field which neither of the former products has been able to reach. Technical powdered magnesium hydroxide, also a product not previously available, has been found of interest as a neutralizing medium because of its high reactivity and formation of soluble reaction products. It is substantially less costly than caustic soda and lacks the disadvantages of lime. The by-product calcium sulphate, from the process, is a valuable material, and its production is being a marketable point instead of being a valueless waste. These highlights must serve as comments on the magnesia division prod-

uets, as there remains much ground to be covered. Before discussing the next operation, however, it should be mentioned that no large-scale recovery of either the salt or the potash content of the brine has yet been undertaken. Although the potash tonnage in the brine processed is not large, it is nevertheless a substantial item. Pilot operations have indicated the feasibility of its recovery from the waste of the re-crystallizing plant, and it is expected that the operation of this plant, with the operation of this new plant, will become practicable. It is also obvious that the sodium chloride tonnage possible of cheap recovery is very large.

Special Lime Is Required

The vital necessity of cheap lime of special characteristics for the magnesite products plant has been pointed out above. Years ago San Francisco Bay abounded in beds of small Pacific Coast oysters, and although five oysters have largely vanished from the bay, their shells, in the form of immense beds of oyster shell, remain. For years much of the Portland cement made in the San Francisco district has used this oyster shell as a lime source. By the application of suitable dredging and washing methods, oyster shell can be obtained as an almost pure calcium carbonate, containing only less than 1 per cent of magnesium carbonate, under 0.1 per cent silica, and traces of iron, aluminum, and manganese oxides.

Work on the processing of oyster shell to a chemical lime of unique character was started some three years ago, and culminated in 1930 with the construction of a commercial lime plant with a capacity of about 12,000 tons yearly. Shell dredged from suitable banks in the lower bay is thoroughly and repeatedly washed on the dredge, barged to plant, and burned in a rotary kiln, which is followed by rotary cooler storage bins, continuous hydrator, mill, etc. Lime plants are an old story to the chemical industry, and no elaborate description of this one will be attempted. In one respect, however, it is unique. In spite of the fact that it is regularly producing lime for normal markets, it is pointed out early toward the preparation of the magnesite plant for the magnesite plant. A finding of many years' standing in the operations of the Sierra Magnesite Co., namely, that the reaction properties of its commercial magnesium oxides were dependent on degree of molecular aggregation, which in turn is a function of processing time-temperature—proved to be transferable in solution of the problem of lime-quality control. (Numerous patent applications in this field are pending.) To develop the desired character, required the application of temperatures as high as 1,600 deg. C. No normal or even high-alumina firebrick will

withstand such a temperature under the conditions which exist in a rotary lime kiln. Fortunately, the art of manufacture of refractory brick from relatively pure crystalline magnesium oxide (artificial periclase), which for several years an associated organization has produced, had advanced to the point of allowing the use of a periclase refractory to be considered. In a periclase lined rotary kiln, any general assignable construction of brick, even without the slightest lining attack, Oyster-shell lime burned at these abnormally high temperatures, is not only uniquely valuable for the magnesite products plant but is a chemical lime which is exceptionally pure and possesses an extraordinarily high reaction and settling rate. It is accordingly being offered to Pacific Coast markets both as quick and as hydrated lime. Incidentally, it should be mentioned here that for the attainment of these high temperatures in a rotary kiln, natural gas has proved a dismal failure.

Operations of the Sierra Magnesite Co., Ltd., must be paced in rather hasty review. All of the active magnesite producers of the United States are found on the Pacific Coast. All of the caustic calcium magnesite made in this country is produced in California. Two operators have long dominated this latter field, one of which is the Sierra Magnesite Co. In the heyday of the oxyacetylene industry, far greater tonnages of calcium magnesite was consumed than at present.

With the shrinkage of oxyacetylene fuel, the other consuming fields have been sought. The most important of these is found in the use of artificial periclase as a refractory. Although periclase has long been recognized as a constituent of normal dead-burned magnesite, it was believed that the production of a high-purity product, because of absence of fluxes, involved temperatures beyond the range of a fuel-fired furnace. A moderate quantity of periclase was made by electrolytic purification, but costs were so high that the use of the material was limited.

Some five years ago, through a combination of personal vision, technology as applied to a rotary kiln, and use of a periclase refractory lining, a high-purity artificial periclase was first produced in the Ivterville (Calif.) plant of the Sierra Magnesite Co. In the intervening period both plant and refractory production practice has been improved to the point where high-purity periclase is now available at low cost. The refractories produced from this material, which have properties of high load resistance and freedom from swelling formerly believed impossible, attainment in a magnesite plant of prices not being regarded as offering any advantage over the normal periclase bricks equivalent to those demanded for normal magnesite brick.

Development of this product has necessitated an expansion of manufacturing facilities on the part of the Sierra Magnesite Co. Its Ivterville plant and mines were judged inadequate to cope with the growing demand for material of extremely high purity. Extensive work on a new magnesite property near Gustine, Calif., had been under way for some time, and with the defining of a large tonnage of extremely high purity ore there, construction of a fully modern manufacturing plant was undertaken in the summer of 1931, operation being scheduled for late fall. This plant, located at the Ibad Eagle Mine, is approximately 16 miles from the western boundary of the upper San Joaquin Valley. Magnesite (natural magnesium carbonate) occurs as a blanket 4 to 12 ft. thick in decomposed serpentine. Aside from approximately 2 per cent calcium carbonate, impurities are confined to very small quantities of the oxides of silicon, iron, and aluminum. Some waste material high in impurities is unavoidably introduced in mining, but, fortunately, these impurities suffer radically in hardness from the air proper. Accordingly, mine-run ore is crushed, screened on multiple deck screens, over-size migrate toward the fines. Calcining of properly blended material is accomplished in a 100-ft.-d. rotary kiln, lined with special pebble refractories, and fired with oil. High caustic-chlorine and dead-burned magnesite, as well as artificial periclase, will be made in the Ibad Eagle plant. Products will be transported by truck, Southern Pacific, and R.R. at Igoumish, Calif. Capacity of the new operation is to be 12,000 tons annually, with definite provisions for doubling or trebling output. After it is functioning smoothly, operation of the Ivterville plant will be discontinued.

Magnesia Sources Interchangeable

It is of interest to note that the magnesite products plant at Newark, using calcium and lime as raw materials, can and has duplicated the production of the Ivterville and Ibad Eagle operations, which use magnesite as raw material. Conversely, magnesite may, in selected cases, serve as raw material for products normally produced at Newark from lime and bittern. The advantages of this interchangeability, in following changing raw material and market situations, is obvious. It makes further apparent the logic behind the consolidation of two industries which on the surface are but little connected but which it may appear are uniquely interrelated. Why, then, are the Ivterville and Newark plants, under typically western conditions, these operations add color to the rapidly developing chemical picture on the Coast.

The Court: We will take an adjournment in this case until Wednesday, December 10, 1947.

(An adjournment was thereupon taken until Wednesday, December 10, 1947, at 10:00 o'clock a.m.) [85]

Wednesday, December 10, 1947, 10:00 o'clock a.m.

The Clerk: Pacific Portland Cement Company v. Westvaco.

Mr. Bennett: Ready for the plaintiff.

Mr. Rosenberg: Ready.

The Court: You may proceed, gentlemen.

Mr. Bennett: Your Honor, as so frequently happens, minor typographic errors appear in the transcript. Yesterday Mr. Rosenberg kindly called to my attention certain corrections that he wished to suggest in the transcript with reference to his opening statement, all of which I agreed to, and we read over the remaining portion and likewise found minor corrections. I thought perhaps in a case of this type, involving as it does technical phraseology, that perhaps it would be of aid to the Court and counsel if we could make our corrections as we go along. I have here both the list of the corrections suggested by Mr. Rosenberg and those of mine that I wish to suggest. I have not handed Mr. Rosenberg the corrections that I wish to make. They are all of minor nature, spelling of words and so on.

The Court: I do not think there will be any difficulty about any corrections that either side wishes to make to the transcript, and if you can

not have an accord there, I will try to help you.

Mr. Bennett: As to Your Honor's copy, shall I hand the [86] corrections to Mr. Welsh?

The Court: Very well.

Mr. Bennett: One other preliminary matter: Mr. Rosenberg, I understood you to say when we last convened, either in your opening statement or later on, the defendant corporation had not made nor does it claim the right to make charges for direct costs or direct processing costs up to the point that the separation of the calcium sulphate or gypsum from bittern is made.

Mr. Rosenberg: With the exception of the bittern charge, it is not in controversy, as I understand it. There has been no price increase based upon increase of cost of bittern. As a matter of fact, in the last price increase there was in fact a decrease in bittern cost, but with that exception, that is true.

Mr. Bennett: The statement I have made is true with the exception that you have claimed the right to charge a portion of the cost of the manufacture of gypsum, the initial cost of the bittern so used?

Mr. Rosenberg: A portion of it, yes.

Mr. Bennett: But as to all other processing costs, up to the point of separation of the calcium sulphate, you have not made or allocated against gypsum any of the costs?

Mr. Rosenberg: That is true. So that there won't be any misunderstanding, we do allocate to gypsum a portion of our [87] general overhead and indirect cost, but the allocation is made on the basis of our

labor cost in connection with the processing of gypsum after the point where the gypsum is separated.

The Court: No overhead prior to that period.

Mr. Rosenberg: No, Your Honor. In other words, we use as a basis for allocating of overhead the labor charges in the gypsum plant as related to the entire labor charges in the entire plant, so that in effect the result is we do allocate overhead on the basis of the relation that those labor charges bear to the entire labor charges in the plant.

The Court: So I may follow you, so there is no question about it, the overhead charges that you have in mind begin when? At what period? Through the whole period?

Mr. Rosenberg: I think I can explain it this way, Your Honor: When you are operating a plant, you have overhead charges continuously.

The Court: I understand.

Mr. Rosenberg: In order to determine what proportion of those general overhead charges are properly allocable to gypsum, we allocate them on the basis which the labor charges which are directly related to the gypsum processes bear to the entire labor charges in the plant. So our position is that results in allocating to gypsum a portion of the overhead. It is equivalent to allocating overhead after the point of separation. [88]

The Court: Does any charge begin before that time in relation to overhead?

Mr. Rosenberg: For instance, Your Honor, let us take the western manager of the company. He is

there all the time and his duties relate to everything that goes on in the plant.

The Court: All right. Then there is no charge at the very inception of this process?

Mr. Rosenberg: Not as such.

The Court: It would be well to clear that up, and I think you had better take some time so there will be no question about it. I had better take a recess so you won't hurriedly get on this record without having a full understanding of the charges, whatever they may be. I say that advisedly.

Mr. Rosenberg: Let me say this, and if this does not clear it up for the Court, then I will try to clear it up further: At the end of the month we know that during that month we have had various general expenses which can not be attributed directly to any product, such as the manager's salary, supervisory employees, accounting expense, and things of that character, so then at the end of the month we allocate those general expenses to the various products that we produce in the proportions that the direct charges of labor, directly attributable to those various products, bear to the entire labor charges. Does that make it clear to the Court?

The Court: It is clear to me, either one way or the other, [89] but I wanted to clear up in my own mind, and the reason I indicated was, the truth of the matter is from the standpoint of overhead charges attributable to this magnesium begins at the very inception of the operation.

Mr. Rosenberg: You mean gypsum, Your Honor?

The Court: Or gypsum, rather.

Mr. Rosenberg: I do not think that—

The Court: There is overhead, keeping in mind superintendents, supervision and what not, labor costs—there is a percentage that is attributable to that, isn't there?

Mr. Rosenberg: A percentage, but the percentage is based upon the labor charges that occur from this point on.

The Court: No overhead charges begin until that point in relation to this product?

Mr. Rosenberg: I think we can say that on the basis—

The Court: It would be well to clear that up. That is the only reason I developed this thing so there would be no misunderstanding. For after all, according to your statement, there is an overhead charge at all times.

Mr. Rosenberg: There is of necessity, yes, and then to determine—

The Court: And then you say it begins at this point in the process. We are talking about two different things.

Mr. Rosenberg: Let us say this, that none of the charges that are directly attributable to this process here or the one [90] that precedes it, direct charges, are charged to gypsum. The only direct charges that are made to gypsum are the charges for labor and materials that occur from the time that that material is separated at this point.

The Court: All right. There is an indirect charge, then, according to your own statement. Overhead still remains.

Mr. Rosenberg: Oh, yes, we have to have a plant there to manufacture this stuff. We could not do it out in a lot. So in order not to burden this product with more than its just share of the overhead, we allocate to this product only that proportion of the general overhead that the direct labor charges performed in the processing and the refining of this product bears to the total labor charges in the entire plant, and we think that that results in giving to this product only the proportion of the overhead that is fairly attributable to it.

The Court: I shall ask Mr. Bennett to get on record and see what his understanding is.

Mr. Bennett: I have been trying to find that out, Your Honor. The day before yesterday, when counsel mentioned that, it was the first time. As I understand it, his statement now is in this operation for the manufacture of the principal product, the magnesium oxide over here, and then the manufacturer of this by-product, namely, the drying, grinding and delivery of the calcium sulphate, which is precipitated off from the [91] bittern, so that impurities may be removed from the magnesium sulphate, the pumping in, the acquiring of the bittern, the handling of that fluid through the process of mixing in the sulphuric acid and the mixing of the calcium chloride and the other steps up to the point of separating off from the fluid this calcium sulphate, which is the gypsum factor, no direct charges are made except counsel states that they have allocated against the gypsum a portion (what portion

we do not know) a portion of the cost to the defendant of the bittern water that they purchased from the salt companies. But all direct charges or actual charges, as he says, in the handling of that bittern and the operation of the plant up to the time of the separation is not included. They started their cost structure or accounting at the time of the separation and then they charged as actual or direct cost of the production of calcium sulphate the cost of drying, grinding and delivering, that is, labor with incidental workmen's social security, the cost of materials, heat, power and water that is used in this further process of drying, grinding and delivering the calcium sulphate, which Dr. Seaton says would otherwise be a waste product, and those are the costs, Your Honor, that we say under the contract are the costs upon which actual increases may be added to the contract price, but the defendant contends that in addition to these direct or actual costs of producing the gypsum, this calcium sulphate by drying, grinding and delivering it to the [92] plaintiff corporation, they are entitled to add, and they say that they have figured on their books by a process of accounting and allocation a certain proportion of the total overhead and indirect charges of the operation of the whole plant, and as the evidence shows also some of the overhead of the New York office. We dispute and will offer evidence by experts that it is not proper in this situation to consider this overhead and indirect items a part of the cost of manufacture under this particular contract. It might be for purposes of the

accounting of the business itself, because the business can set up any sort of system—it can allocate 10 per cent, 20 per cent or nothing to a by-product—but so far as this contract is concerned, in the light of the manifest intention as shown on the fact of it and the actual intention and construction by the parties, the overhead items and the indirect items should not be included in any basis of computing any actual increases in the cost of producing the gypsum; but counsel has said they contend otherwise, and they have allocated a portion of their total overcharge and indirect items to the actual or direct cost of manufacturing this or producing this gypsum from the point of separation, and the proportion of those overhead and indirect items is determined by the relation of the actual or direct costs of manufacturing or producing this gypsum bears to the total or all of the overhead and indirect items of the whole plant during the whole period of the year. Now, that, as I [93] understand it, is counsel's position, is that correct?

Mr. Rosenberg: Well, substantially. You say all the direct charges. I limited that to labor, Mr. Bennett.

Mr. Bennett: And I understand, too, in allocating the overhead or this portion, so far to us unknown, to the claimed costs of manufacturing, the claimed actual increase of the cost of manufacturing or producing the gypsum, as the language in the contract reads, is based upon the overhead not only of this entire plant, but of the defendant company's West Coast operation and the New York office, is that correct?

Mr. Rosenberg: That portion which is allocable to the Newark plant. In other words, it is based upon all of the necessary overhead charges that are necessary to make this an integrated, functioning, manufacturing unit. That is it. Now, as I say, there is one thing I probably neglected to mention and that has already been mentioned, and that is the only other charge that we make to gypsum prior to the point of actual precipitation is the sulphuric acid during the time that we are not making bromine, the reason for that being the evidence will show that that sulphuric acid is necessary in order to precipitate the gypsum.

Mr. Bennett: Now, on that point—

Mr. Rosenberg: May I say one other thing, Mr. Bennett? You seem to be a little surprised at this information, but I think if you read the answers to our interrogatories you will [94] notice in the exhibits that are attached, it is clearly stated that overhead is allocated on a labor basis. Exhibit A, Exhibit B, overhead is allocated on a labor basis. Exhibit C, overhead allocated on a labor basis.

Mr. Bennett: We did not know the labor basis started at this point.

Mr. Rosenberg: Mr. Flick testified the other day that Mr. Cuneo told him we charged no labor to gypsum prior to the point of separation.

Mr. Bennett: Well, I was confused about that, Your Honor. I did not have in mind that all the direct charges. Perhaps counsel is right about the labor. But I understood him to say the day before yesterday there were no direct charges, and he has

repeated this again today, that there were no direct charges in this operation up to the point of separation of the calcium sulphate, which is gypsum in the wet form, or made against that, except a portion of the bittern, the cost of the bittern, and now all of the sulphuric acid, is that correct?

Mr. Rosenberg: That is correct.

Mr. Bennett: You also agree and will stipulate, Mr. Rosenberg, up to July 1, 1945 and from 1937 up until that time, no part of the sulphuric acid you used at your plant in this operation or any operation from which gypsum was produced as a by-product was charged against the gypsum?

Mr. Rosenberg: That is right. It was all charged to the [95] bromine.

Mr. Bennett: Yes.

The Court: I am possibly responsible for this, but I like to follow the testimony and that is the reason I had to have this explanation. Now, is it as clear to both sides—

Mr. Rosenberg: Is it clear to the Court, Your Honor?

The Court: Oh, it is. We are talking about overhead, which is a charge on everything.

Mr. Rosenberg: That is right.

The Court: And then we come in and we are charging beginning at a certain point directly to gypsum.

Mr. Bennett: I think Your Honor has been of help to me. I do not know whether counsel has had this in mind.

The Court: Well, I have not gone over your pleadings nor your interrogatories nor familiarized myself at all with the case. I like to meet any problem with an open mind.

Mr. Bennett: I think it is well that we have our positions stated now.

The Court: Is there anything else that you have in mind?

Mr. Rosenberg: In other words, I wanted to make sure that the Court understands that the overhead is allocated on the basis of the labor that is performed on the gypsum from the time that it is separated from the bittern.

The Court: May I inquire if you know—and it is because I am limited in this accounting field—what would be the overhead [97] at the very inception? A fraction or what, in relation to your gypsum?

Mr. Rosenberg: What would be—

The Court: Or any kind of charge. Maybe that is not a fair question.

Mr. Rosenberg: I do not think I am competent to answer that.

The Court: On every product there is a charge for overhead, anything produced in any factory.

Mr. Rosenberg: That is right.

The Court: All right. What is the percentage in relation to the product gypsum?

Mr. Rosenberg: Well, it varies. There is no fixed percentage.

The Court: That is the reason I am inquiring. Maybe it is not a fair enough question. I am not close enough to your problem.

Mr. Rosenberg: In the year 1942, out of total charges of \$1.93 per ton, overhead was 42 cents; in the year 1943, out of total cost of \$2.71, overhead was 82 cents. In the period—

The Court: I just wanted one example. For example, the first one in 1942, it was 42 cents?

Mr. Rosenberg: That is right.

The Court: What was that made up of?

Mr. Rosenberg: Here are the subsidiary accounts which [97] make up that total: Research, research new products, plant accounting, purchasing and stores, engineering, Newark supervision, Newark general plant expense, Newark shop and maintenance, Newark laboratory, Newark plant protection, Newark process control, West Coast general expense, West Coast general supervision, West Coast telephone and telegraph, West Coast New York office—that means a portion of the New York office expense that is allocated to this plant—West Coast exploration, West Coast subscriptions and donations, West Coast cost control—

The Court: Let us take any one of those items. Have you the figures available there?

Mr. Rosenberg: Yes, Your Honor.

The Court: Telephone, for example, so I may follow it through.

Mr. Rosenberg: Well, telephone and telegraph in the period from July 1, 1944 to June 30, 1945—that is a period of twelve months—there was a total of \$711.57 allocated to gypsum for the year.

The Court: That would be a percentage of what?

Mr. Rosenberg: That would be a percentage of the total.

The Court: Limited to this plant here?

Mr. Rosenberg: Yes.

Mr. Bennett: The whole West Coast operation part of the New York expense, too, I understand.

Mr. Rosenberg: I do not know. That is something we will have to get from the accountant. Mr. Ray may know that.

The Court: That is why I got into this discussion. However, both sides will be comforted with the record here. Let us proceed.

Mr. Bennett: Your Honor asked one question with respect to one specific example. I thought that this might be illuminating: Using their own figures from July 1, 1945 to June 30, 1946, their direct charges, that is, the charges for labor, labor repairs on machines in the manufacture of gypsum, workmen's compensation insurance, social security taxes, materials and supplies, operations, materials and supplies, repairs, water, power, gas, fuel oil, which was a direct or actual cost of producing gypsum, was asserted by the defendant to be \$1.13 per ton. The indirect or the total alleged or claimed cost of production, including the indirect and claimed overhead items, amount to, according to their figures, \$3.12. In other words, the direct or actual cost according to their figures was \$1.13. They claim \$1.99 additional overhead and indirect charges for that period.

The Court: You will have experts on both sides?

Mr. Bennett: Yes, Your Honor. Mr. Flick, will you take the stand, please? [99]

Mr. Bennett: My colleague, Mr. Kaapcke, called my attention to a possible slip of speech. He said

I said something about charges that we don't question. I was referring to the actual or direct charges, the cost or actual cost and the actual increases in the cost of manufacture of gypsum as I have previously indicated, the cost for drying, grinding and delivering. We do question any allocation from the bittern. We do question any part of the sulphuric acid; that will be shown by the record and the evidence before Your Honor.

The Court: Very well.

Mr. Rosenberg: So the record may be clear, Mr. Bennett, you realize that there is no claim of bittern charge involved in these increases; that is true, isn't it? In other words, the last increase we gave you, our cost was reduced from 18 to 16 cents per ton and in 1942-1943 it was charged the same, both periods.

Mr. Kaapeke: I think that is correct except that on defendant's books as disclosed by the costs furnished us, it shows in the period of the first increase there was a bittern increase of 4 cents.

Mr. Rosenberg: That is not in controversy in this litigation.

Mr. Bennett: Well, in this litigation it is in controversy because we have a contract to deal with in the future. I want to get it perfectly clear to the Court so you are not [100] misled and in order to have it clear, I will state we object to the inclusion in the cost of products under the contract as intended by the contract of this by-product gypsum or any cost of bittern or any cost of sulphuric acid. The evidence will show Your Honor the reason why.

The Court: Very well.

Mr. Bennett: Mr. Flick, will you take the stand?

C. BRUCE FLICK

recalled, previously sworn.

Direct Examination (resumed)

Mr. Bennett:

Q. You testified the day before yesterday that you had been down to the plant of the defendant at Newark and were shown some figures that were represented by the defendant's representative to be taken from their books and you then returned to your office. I will ask you, Mr. Flick, whether under date of February 4, 1944, you wrote a letter to the defendant at Newark, California, copy of which letter I now hand you.

A. Yes, I wrote this letter.

Mr. Bennett: Any question about that letter, counsel?

Mr. Rosenberg: No question.

Mr. Bennett: I offer this in evidence as Plaintiff's Exhibit No. 4.

The Court: Admitted and marked. [101]

(Thereupon the letter in question was received in evidence and marked Plaintiff's Exhibit No. 4.)

Mr. Bennett: It is dated February 4, 1944 addressed to Westvaco Chlorine Products Company, Newark, California, att: Mr. W. K. Wallace, Western Manager.

(Testimony of C. Bruce Flick)

“Gentlemen:

“Subject: Westvaco Cost Charged to Gypsum

“We have reviewed the suggested form of letter which Mr. Wallace handed to Mr. Flick on January 31, 1944, to be addressed by Pacific Portland Cement Company to Westvaco Chlorine Products Company. We recognize the problem that exists from your point of view, and wish to cooperate fully in solving it.

“As indicated in our conversations, we question the correctness of the proposed price of \$3.76 per ton. The figures you have furnished us show a basis for claiming a certain amount of price increase, but not, as it looks to us, to the full extent of 78c per ton. We are advised that when application is made to O.P.A. for authority to increase the price, it should be on a definite and unquestioned basis, as otherwise the application might be prejudiced.

“Your figures show that the 78c increase is composed of:

“Direct costs	.29
Overhead	.40
Taxes, Insurance and	
Depreciation	.08
Water (I.D.C.)	.01
<hr/>	
Total	.78

“The overhead for 1943 includes \$2,804 on account of a portion of new products research expense. This would not seem to be an “actual advance in cost of manufacture” of gypsum. Pro-rated expense for Purchasing and Stores amounts

(Testimony of C. Bruce Flick)

to \$1,192 for 1943, compared with \$2,170 for materials and supplies. This disproportion apparently results from the method of prorating. Various other items appear to be open to question.

"It is our understanding that according to generally recognized accounting practice, by-product gypsum should be charged only with costs directly incurred to put it in marketable condition, and should not be charged pro-ratas of overhead expense which the plant would have regardless of gypsum production and which do not represent actual cost of manufacture of by-product gypsum.

"We should like to suggest that we examine in greater detail and discuss further with you all the accounting charges in question and see if we cannot agree as to their correctness under the contract, before proceeding further. We know you wish to avoid any unnecessary delay, and we shall await your call.

"Very truly yours,

"Pacific Portland Cement
Company

/s/ "C. B. FLICK

"Controller

"CGF:EH" [103]

Q. (Mr. Bennett): Prior to writing that letter, you had received from the defendant a form of letter which was mentioned in your letter of February 4, which they had asked you to send on to them for the purpose of enabling them to make an OPA application for an increase in maximum price?

(Testimony of C. Bruce Flick)

A. Yes, I have. They had prepared a copy of a letter which they wanted Pacific Portland Cement Company to sign which would accompany their application to the Office of Price Administration for an increase in their permitted maximum price under the maximum price regulation. The price was frozen at \$2.98 where it had been in 1942 when the OPA basic period was stated.

Q. Do you have a copy or any record in your files of that letter other than the reference to it in your letter of February 4?

A. I do not have a copy of that first draft of that letter. I did find the final letter which we eventually signed to go along with that application, but I have no copy of that first proposed letter.

Mr. Bennett: I suppose, counsel, your client does have a copy of the letter sent prior to February 4?

Mr. Rosenberg: I don't believe I have, Mr. Bennett.

Mr. Bennett: It probably is not material, Your Honor. I just wanted to show why we haven't produced it.

Q. In your letter of February 4, or following your letter of [104] that date, February 4, did you receive a reply or was there any conference concerning the matter stated in that communication to them?

A. I don't believe that we received a written reply, only a day or so later, in fact, on February

(Testimony of C. Bruce Flick)

7, Mr. Wallace and Mr. Williams of Westvaco came to my office and discussed the questions raised in the letter and particularly with reference to the question raised in the letter as to the claimed increase of cost. Westvaco claimed the cost had gone up 78 cents, 29 cents therein on direct charges and the remainder of 49 cents was in all of these overhead and other allocations. So Mr. Wallace and Mr. Williams came to my office to talk about it and discuss these questions.

Q. What was said by Mr. Wallace, Mr. Williams and yourself in connection with that subject matter at that time and place?

A. Mr. Williams stated that this gypsum, we discussed the question of whether the gypsum was a byproduct. Williams said the gypsum was a co-product and not a byproduct. He said he was a little hazy on the terms of the contract but as far as he was concerned, byproduct did not mean anything, that it was a co-product, not a byproduct. I pointed out various reasons why in my opinion it was a true byproduct as recited in the contract and that being a product incidental to the production of magnesium oxide that they could dump it if they chose instead of drying it and grinding it and delivering it and the [105] contract required that we take all of it in excess of 4,000 tons a year and the contract itself said it was a byproduct and the plant was built primarily to produce magnesium oxide and the gypsum was of little expense—I mean, it was only about 5 per cent of the labor for the entire

(Testimony of C. Bruce Flick)

plant and the sale thereof on the presumption—I will skip that because I made a presumption. The value per ton of gypsum was only about one tenth of the value of ton of the magnesium. But under my reasoning as an accountant, I considered it was a true byproduct and we should apply to it only the direct charges and not all these overhead allocations.

Q. This was the discussion—

A. This was the discussion with Mr. Wallace, W. K. Wallace of Westvaco, and Mr. Williams who was at that time an assistant to the president, I believe, but he was out here from New York for the purpose. They did not deny any of my points but they said regardless of all that they considered it a co-product because that was their practice in all their plants throughout the United States, that they had a uniform accounting system but they believed their uniform accounting practice of allocating all overhead to all products should apply, and of course, I said, “Well, an accounting practice which you follow in your own company for your own purpose is entirely satisfactory to you, but not appropriate to this contract for the purpose of the escalator clause.” I even told them I had seen in the files a [106] letter that Mr. Barrows wrote to Mr. Colton in which he specifically mentioned the items—

Mr. Rosenberg: I will object to any testimony from this witness as to what he saw in somebody else's files. He is about to go into something that will be objectionable.

(Testimony of C. Bruce Flick)

Mr. Bennett: This is a discussion.

The Court: Pardon me. The objection goes to that letter that he saw in the files.

Mr. Bennett: Well, he has stated—

The Court: We are developing a conversation here.

Mr. Bennett: May it please the Court, this was a conversation had between Mr. Flick representing the plaintiff and Mr. Williams, the assistant to the president, and Mr. Wallace representing the defendant, and the subject of the conversation was the interpretation of the contract and the letter that Mr. Flick is referring to, he says when they were talking about their uniform accounting practice including overhead, he says, "I have in my files—"

The Court: In relation to what you saw in the files, was there a discussion about it?

The Witness: The letter I referred to was in this conversation. I said to Mr. Wallace, "I have even got a letter in my file that Mr. Barrows wrote to Mr. Colton in which he mentions labor, fuel and supplies."

Mr. Rosenberg: May I ask what the purpose of this [107] testimony is?

Mr. Bennett: Well, counsel, you said in your opening statement, one thing, that this contract was invalid because costs of construction were up, cost of manufacturing and actual advances in the cost of producing and manufacturing gypsum was so uncertain, ambiguous, I think you used the term, that the whole contract is invalid. Our position is,

(Testimony of C. Bruce Flick)

of course, it is not, that all this Court is required to do is what other courts are required to do, that is, interpret the contract in the light of the contract and in the light of the meaning of the parties.

The Court: Proceed. Objection overruled.

Mr. Bennett: Does Your Honor wish me to proceed or do you have another matter?

The Court: We will take a recess.

Mr. Rosenberg: Before we adjourn, I notice the witness has been referring to notes to answer the questions. Could I take a look at those notes during the recess?

Mr. Bennett: For the record, I will have the witness describe what the notes are.

The Court: Well, he just wants to look at them.

Mr. Bennett: Certainly, he can do that.

(Recess.)

The Court: You may proceed.

Q. (Mr. Bennett): Mr. Flick, did you repeat the substance [108] of the conversation you had with Mr. Williams and Mr. Wallace of the defendant corporation and yourself in your office on February 7, 1944?

A. I completed most of it. I believe I had just mentioned the fact we were discussing what ought to be included in these charges to the cost of production of the byproduct gypsum and I had just mentioned the fact I told Mr. Williams and Mr. Wallace that I had seen the letter from Mr. Barrows to Mr. Colton specifying labor, fuel and supplies. We left it that I would further review with

(Testimony of C. Bruce Flick)

Mr. Wallace what Mr. Williams called technical accounting questions. He said when they got all through with that there was still what he terms a practical situation that Westvaco must get enough for the gypsum to make it pay to produce it. I said there was no question about their right to charge all direct or actual costs but allocating overhead which was not out of pocket expense for producing gypsum—a particular illustration that stuck in my mind was the “New Products Research,” they were charging 10 cents a ton, and another illustration was the excessively high charge for purchasing stores expense. That was about all that discussion.

Q. Counsel referred, and it was obvious to the Court, that you were referring to a memorandum or a paper when you stated the conversation that took place at that time, Mr. Flick. What was the paper or memorandum that you referred to?

A. Well, this paper is a memorandum of that conversation which [109] I dictated immediately following the conversation.

Q. I hand you herewith a copy of letter from California Chemical Company, Mills Tower, 220 Bush Street, San Francisco dated June 5, 1936 addressed to Pacific Portland Cement Company, 111 Sutter Street, San Francisco, Attention: Mr. Colton, Vice President, and purports to be signed by California Chemical Company by Stanley H. Barrows, and I will ask you whether that is the letter that you referred to in your statements or discussions with Mr. Wallace and Mr. Williams on this 7th day of February, 1944, conversation.

(Testimony of C. Bruce Flick)

A. Yes, this is the letter. I think what I had in mind is on page 3 of this letter where he said—

Mr. Rosenberg: Just a minute. The letter is the best evidence of its contents, I submit.

Mr. Bennett: I offer the letter in evidence.

Mr. Rosenberg: To which I object on the ground it is incompetent, irrelevant and immaterial; the proper foundation has not been laid. This letter purports to be a copy of a letter dated June 5, 1936, which is seven months prior to the execution of this agreement. I think that before this letter comes in we are going to have to argue to the Court on the admissibility of any evidence relating to the negotiations that resulted in and were merged in this contract. Mr. Colton is now here in court. I see him sitting in the court. The letter was addressed to him. I presume counsel is going to put him on the witness [110] stand. I would suggest that rather than arguing the matter at this time that this be marked for identification and before a foundation is laid by counsel as he apparently is about to go into a matter antedating the execution of this agreement, I think that is the time to argue the admissibility of that evidence. I am prepared to argue it now. I am offering that as an expedient way to dispose of it.

Mr. Bennett: Before Your Honor even attempts to determine the matter, I would like to call Your Honor's attention to Mr. Rosenberg's own statement when he was cross examining Mr. Colton on this question of going into the details surrounding

(Testimony of C. Bruce Flick)

the execution and leading up to the execution of the contract.

Mr. Rosenberg: I will object to any reading from a deposition that is not in evidence.

Mr. Bennett: Well, I am doing it just in the court record here and it is your statement of your position as to your right and the province of the Court to go into this subject matter. I think I can quote counsel just as though you had said it at some other time.

Mr. Rosenberg: I will object to any reading from a deposition in here. I will make my position quite clear.

The Court: For the purpose of the record, you objected because the proper foundation has not been laid. In other words, what you have in mind—

Mr. Rosenberg: The letter purports to be from Mr. Barrows. [111] The foundation has not been laid as to who this Mr. Barrows is. The foundation has not been laid as to who Mr. Colton is. My main objection, however, of course, is on the ground that any negotiations that antedated the execution of this agreement are merged in the agreement and the agreement speaks for itself. If counsel is going to offer evidence as to the negotiations by correspondence between the parties leading up to the execution of this agreement, Your Honor, I want his position clearly stated for the record and I am not in a position to ask that at this time.

The Court: I am going to call the grand jury now. They are here. Be prepared to argue the ad-

missibility of it after we dispose of the grand jury.

(Recess.) [112]

Mr. Bennett: Counsel, I would like you to answer this as preliminary, and in view of the general objections you stated to clear up the point of foundation: Is it not a fact that on June 5, 1936, Stanley H. Barrows was president of the California Chemical Company, the original party seller under this contract, and was its president on the date of the execution of the contract in question?

Mr. Rosenberg: That is right.

Mr. Bennett: I will ask you to stipulate that Mr. Colton, to whom this letter of June 5 is addressed, was on the 5th of June, as well as on the date of the execution of this contract, vice president of the Pacific Portland Cement Company, the plaintiff in this action?

Mr. Rosenberg: That is right.

Mr. Bennett: With that, Your Honor, I think it is perfectly clear this letter is admissible. I need not discuss the parol evidence rule with Your Honor. That rule is that if a term used in a contract is perfectly clear and free of any ambiguity, the Courts usually do not go beyond the contract itself for an interpretation, that is, the term as used in the context in relation to the purpose and objects of the contract, as used in the particular sense and way in which it was used.

On the other hand, if there is question as to the meaning of a term, in this case in the escalator clause providing a right of the defendant to increase its price upon an actual— [113] I quote the

words of the contract—"an actual cost of production," "cost of manufacture," terms used in the contract, of this byproduct gypsum, counsel says for the defendant that it is ambiguous. He goes so far as to say that it is ambiguous, that the contract is invalid; but he says if it is not that far, at least it means all costs, every cost, indirect overhead as well as the direct costs. We have shown to Your Honor not only by my statement, but the testimony of this witness, that we have taken the view all along that these terms, cost of production and actual advance in the cost of manufacture of this byproduct gypsum, intends and should be limited to the actual or direct cost of the manufacture. That is the principal issue in this case. If there is a question of ambiguity, as counsel asserts, or if there is a question of whether these words were intended to mean and should be construed to mean all embrasive, every possible conceivable cost, or should be narrowed to the actual increase in cost of production so far as the purpose of this contract and that escalator clause is concerned, then under the undisputed rules of evidence, parol evidence, attending circumstances showing what the parties were talking about and intended, is admissible. It is an aid to the Court in interpreting that clause. It is not offered for the purpose of changing the contract, which is the basis for the invocation of the parol evidence rule.

The Court: Is the matter submitted?

Mr. Bennett: Yes, Your Honor.

Mr. Rosenberg: Yes.

The Court: I am going to allow this testimony to go in over your objection and subject to your motion to strike, so both sides will be comforted with the record.

(The document in question was thereupon received in evidence and marked Plaintiff's Exhibit No. 5.)

PLAINTIFF'S EXHIBIT No. 5

California Chemical Company
Mills Tower, 220 Bush St., San Francisco

June 5, 1936

Pacific Portland Cement Company
111 Sutter Street
San Francisco

Attention: Mr. Colton, Vice-Pres.

Dear Mr. Colton:

Following our verbal discussion, I will attempt to outline in brief form, a proposed basis of conditions that may be of interest in an inter-corporate relationship holding mutual advantage. It is, of course, to be expected that in case an understanding is reached on the major points involved, that a great many details not yet even considered will have to be disposed of in the attempt to put such agreement in contractual form.

However, following your suggestion, I will enumerate below a few of the conditions upon which we have done some preliminary work.

1. Our idea would be a contract covering a period of 30 years, covering our entire requirements of shell

roughly estimated at between 200,000 and 300,000 yards per annum.

2. One of our prime objectives contemplates the construction of a major plant located on canal head at Newark to manufacture magnesium oxide and other products by reacting calcined oyster shell and magnesium chloride. From the foregoing operation, we would produce 18,000 tons of Gypsum. The estimated equipment for calcining lime in this connection would contemplate that we would have excess calcining capacity for approximately 10,000 tons annually of calcined quicklime over and above our own estimated requirements.

3. We would propose a contract permitting us to dredge and prepare oyster shell taken from oyster shell beds own by you. We require a certain type of shell and consequently, location of dredging rights would have to be determined.

4. We propose to pay you five cents per cubic yard of shell removed from your properties. The method of determining quantities so taken to be decided upon by mutual agreement.

5. We would offer to sell you all of the Gypsum produced by said plant except 3,000 tons for which we reserve the privilege of marketing for chemical uses. This would leave an estimated 15,000 tons per year of Gypsum which we would offer you at \$2.60 per ton, loaded on cars at our plant at Newark.

6. We would also offer to sell you up to 10,000 tons of calcined lime based upon present contemplated plant capacity. We would agree to supply this

lime either in bulk quicklime or hydrated form at prices next below noted:

Bulk quicklime loaded on cars, \$6.50 per ton.

Hydrated lime in 4-Ply paper bags, \$8.50 per ton.

7. The foregoing prices are based upon present contractual costs for oyster shell for which no royalty or other purchase fee is charged. For each one cent per yard you charge us for oyster shell add to the above quotations as follows:

For Gypsum, 4c per ton.

For Quicklime, 6c per ton.

For Hydrated Lime, 5c per ton.

8. We desire the right to sell up to 3,000 tons per year of Gypsum for strictly chemical purposes, but would agree not to sell Gypsum for plaster, agricultural, building or other uses that would compete with your present outlets.

9. We desire the right to continue to sell Quick or Hydrated lime for industrial and chemical uses as at present, but would agree to forego any activities or sales to the construction and agricultural industries leaving these fields exclusively to you.

10. We desire the right to continue to sell shell for industrial uses as at present and would want to work out some mutually satisfactory deal to sell shell for poultry and agricultural use. The quantities and conditions regarding shell referred to in this paragraph to be worked out on a reasonable basis.

11. Contract would contain certain price protection clauses to guard against increases in labor, fuel and supplies, some moderate minimum payment in order to keep the contract alive in depression or competitive siege, privilege of cancellation by us on fif-

teen-month written notice, together with the many other features not intended for preliminary contemplation.

I would appreciate it very much if you can arrange to give the matter your early consideration, inasmuch as we are desirous of holding meetings early in July ostensibly for the purpose of arriving at decisions concerning construction at Newark. We, of course, will be very glad to meet with you meantime as is necessary in order to bring the main features of consideration in line, satisfactory if possible to both parties.

In case you should be interested in purchasing lime additional to the 10,000 tons per year mentioned herein, we would consider increasing capacity, contemplating cost plus amortization plus moderate profit providing that prospective volume and conditions should later justify such action.

I will await further word from you, and with kind regards, I am

Yours sincerely,

CALIFORNIA CHEMICAL COMPANY

By /s/ Stanley H. Barrows.

The Court: We will take a recess until 2:00 o'clock.

(Whereupon an adjournment was taken until 2:00 o'clock P.M.) [132]

Wednesday, December 10, 1947, 2:00 o'Clock P.M.

The Court: You may proceed.

C. BRUCE FLICK,

resumed the stand, previously sworn.

Mr. Rosenberg: Your Honor, I understand the Court ruled about that letter before adjournment subject to a motion to strike.

The Court: And over your objection.

Mr. Rosenberg: I am not going to argue the objection any further. However, I do want my position made clear for the purpose of the record because in the course of his argument Mr. Bennett on several occasions stated what our contentions were. I would like it clearly understood we do not consider that there is any ambiguity on the face of this contract. Our contention, on the contrary, is that the contract contains in it what the parties intended it to contain, that the contract bespeaks the intention of the parties and there was a meeting of minds. It is our contention, however, that although the parties in that contract got into it what they intended to get into it, that is, that the price increase would be based upon cost of production, that for the purpose of this transaction that there are more and more things that were left unsaid, that if the Court would attempt to supplement the language that appears in the contract by anything of the nature contended [133] for by the plaintiff that affects cost of production, they meant only direct cost of labor, materials and fuel, that that would be a departure from the written agreement, that the evidence would have the effect of varying the terms of a written contract and the evidence is not admissible. I still want to state our position

(Testimony of C. Bruce Flick.)

and I also feel, if the Court please, that that evidence having been offered by the plaintiff I am not sure I know the purpose of the offer, and I would like Mr. Bennett to state for the record the purpose of offering that letter in evidence. I, frankly, don't know.

Mr. Bennett: Well, I thought I had stated that, counsel, several times. I stated that we have a dispute here. You contend if this contract is not invalid because of the uncertainty or ambiguity of the term actual advance and cost of manufacture, or the term cost of production of gypsum, it is embraced—well, that is not exactly it, every cost including your costs that are set up as a result of your uniform cost accounting system for your own purposes nationally, that the letter shows that that was not what Mr. Barrows, the president of the California Chemical Company, was seeking at all and it is one of the circumstances and indications that the Court can and should take into consideration, not for the purpose of adding to or subtracting from the contract one bit, but to interpret the terms used. I say this proposal shows that at the very start of the negotiations that the defendant's predecessor [134] was seeking in this escalator clause wherein these terms that are in dispute here as to their meaning occurred; in other words, in fact, states on its face that he had no purpose and there was no intent to include in the escalator clause or price protection clause by the term "cost of production" or "actual advance" or "cost of

(Testimony of C. Bruce Flick.)

production" all these overhead and all these indirect items which you now contend they mean and the intention of the parties as expressed by the contract which is in dispute but which the Court will ultimately determine.

Now, Mr. Rosenberg, there was no dispute this letter was sent by Mr. Barrows?

Mr. Rosenberg: No, no. I am trying to find out the purpose. What I would like to know, is it the contention of the plaintiff that this contract is uncertain and requires explanation or interpretation, or does the plaintiff contend that the contract is clear, that the meaning of the contract can be derived by the language therein?

Mr. Bennett: I think I have stated that several times. I don't think I should state it again. In answer to that question, all I need to say to the Court is to say it is uncertain. That is sufficient to enable us to offer this in evidence. After all, that is what this Court is going to decide. The Court is going to decide what was the meaning of this term.

The Court: Cost of manufacturing.

Mr. Bennett: We are going to show this, the escalator [135] clause wherein the "cost of manufacture" is used to permit an increase in the price to protect the party, the defendant against increases in cost, and the question is what costs. They assert everything, including their company's New York office, and so forth, indirect charges. We, on the other hand, say it was intended to meet

(Testimony of C. Bruce Flick.)

direct costs of manufacture. This letter from Mr. Barrows who proposed this clause in the first place and for whose benefit and only whose benefit it was put in the contract, declares that states that it was his purpose when the contract was drafted to have a clause in there that would protect the defendant against increases in price for these direct charges and it shows that at that time Mr. Barrows and defendant's predecessor did not have in mind nor desired a price protection clause or an escalator clause that would enable them to add to the price charged and add those increases, every conceivable kind of indirect charge or overhead charge. I think that matter has been made perfectly clear. I don't think we need argue that until this case is in position to be argued when all the evidence is in.

The Court: "California will keep books of accounts and records showing its production and cost thereof and such books of record, books and accounts relating to the production of cost of gypsum, shall be open to"—and so forth and so on.

Mr. Rosenberg: I would like to make that request once more. I am frank in telling the Court I am not clear. I am [136] trying to find out whether the plaintiff contends or does not contend that this contract is uncertain or requires explanation or interpretation by evidence dehors the contract. I think I am entitled to know what their position is. Do they claim this contract is sufficiently certain that it does not require any interpretation or any explanation from extraneous sources or do they not? That is all I want to know.

(Testimony of C. Bruce Flick.)

Mr. Bennett: Counsel,—no, he is not entitled now to ask me that question because in the first place I am not required to answer it. He stated the position as one of the litigants here that the contract is uncertain in that particular. So I am entitled to offer evidence here concerning what the intention was. I have already stated a number of times what our position is and I don't think they should state the question—I don't wish to detract from any situation here where some undisclosed purpose may be in his mind.

The Court: At any rate, it is in evidence over your objection and subject to your motion to strike. Your legal position is in the record. Whether it was vague or indefinite or what not, I am not concerned with that now. Proceed.

Redirect Examination

(Resumed)

By Mr. Bennett:

Q. Mr. Flick, have you related to the Court the substance of the conversation of February 7, 1944, between Mr. Wallace and Mr. Williams of the defendant corporation to yourself? [137]

A. I believe I have covered that quite fully.

Q. Now, when was the next conference or conversation that you had with anyone representing the defendant corporation with reference to this same subject matter in dispute?

A. Mr. Williams and Mr. Wallace came to my office again on February 10 for further discussion. Mr. Williams said he had asked New York office

(Testimony of C. Bruce Flick.)

to discuss with their auditors Peat, Marwick and Mitchell—

Mr. Rosenberg: February 10, what year?

The Witness: 1944.

Mr. Rosenberg: Thank you.

The Witness: Asked Peat, Marwick and Mitchell, their auditors, the question whether overhead items should be allocated to a byproduct and their reply was that they considered it good accounting practice and they approved Westvaco's accounting methods. I said Price, Waterhouse & Company, our auditors, told us that good accounting practice for a byproduct would not charge it with overhead. Mr. Williams said Westvaco could not change its uniform accounting methods for one particular purpose such as this contract. I said, well, they could easily keep a few auxiliary accounts for the contract. We have had special accounts from time to time, we have kept special accounts.

Mr. Williams said no two accountants would agree on methods to be followed in allocating costs and "We have used these [138] methods right along, they ought to be continued, and in the long run we will have increases as well as decreases." I said we believed that good accountants reading the contract and knowing how the gypsum was produced, would take the same view that overhead should not be allocated to the by-product, to the cost of the by-product.

Then I discussed with them the question of the decrease in their production, their production of

(Testimony of C. Bruce Flick.)

this by-product gypsum, which was approximately 24,000 tons in 1943 and had been about 32,000 tons in 1942, it had dropped between seven and eight thousand tons in production, and that is about 23 per cent, and I said that I wished they would tell me whether it was true, as I had been given to understand, that part of the reason for that drop was because they formerly used calcium hydroxide made from oyster shells, and they changed their process and were now using dolomite, and I understood this dolomite has a percentage of magnesium, and since they are after magnesium oxide—that change from the use of the shell to the use of the dolomite would give them more of the magnesium substance that they were after, to get the magnesium oxide, and by using the dolomite they wouldn't have to use as much bittern, so they had less bittern and less of the sulphates, and consequently less of the by-product gypsum. The gypsum product had dropped from 32,000 to about 24,000 tons, because you have a smaller tonnage of gypsum by reason of that change. And that would [139] give a higher cost per ton. From 1942 to 1943 these overheads had gone up about 40 cents per ton, and we were asking them if part of the reason for that increase per ton was because the tonnage of gypsum had dropped, because they were using dolomite which had more magnesium in it, and Mr. Wallace said, Well, the change did give them more magnesium oxide, but he said it was made because the Government wanted more magne-

(Testimony of C. Bruce Flick.)

sium oxide, that the cost for the magnesium oxide was far more to Westvaco, and that they did not make the change entirely voluntarily.

Mr. Williams said Westvaco was reviewing all of their operations and shutting down any that is not profitable, any that will not show a suitable profit after bearing its proper share of the overhead. I said, "That is sound, that is all right, but where you are going to discontinue, the discontinuance ought to be based on out-of-pocket basis." In other words, what would the company make by the operation that you would not make without the operation?

Williams said Mr. Colton drove a hard bargain when the contract was negotiated. He had Mr. Barrows on a spot. Westvaco does not complain, but wants a fair and reasonable consideration so both parties may continue satisfied and friendly. I said that certainly was the way we wanted to get along, we wanted to carry out the contract and continue to be friends. I said, "I can't help but feel you have made more money on gypsum than [140] your books show under the accounting system you use." Williams said, "I think you are justified in questioning the charge for 'New product research.'" And Williams said the research was for the Newark plant, California, only, and it would result in bringing down the plant cost, and therefore ought to be included. Mr. Williams asked me to go along with them on what he called a practical commercial basis and agree to the price increase. He

(Testimony of C. Bruce Flick.)

said they had had pretty good luck with OPA, but the price was frozen, costs were going up, and they were tired of it. I told them I could not recommend the 78-cent increase to my management, recognizing fully that Westvaco's figures show increased direct costs, justifying a certain amount of price increase, but that I could not agree with their overhead charges against gypsum.

Williams said they might have to consider dumping the gypsum as waste instead of processing it for sale, if they couldn't make a reasonable profit on it, it wouldn't be worth while to carry on. He said he wouldn't suggest they ought to dump it, because he knew we wanted to continue on. Williams said he felt a further detailed examination of the accounts would be fruitless, in view of the opposite position as to the main accounting principle involved, although they would be glad to have Pacific go into all the detail desired.

Mr. Wallace said, "How about accepting the 78 cents a ton figure with an understanding that the escalator clause [141] will work downward as well as upward, and let's get the term "cost of production" defined, so that we don't have any more arguments about this thing in the future."

Q. Who said that?

A. Mr. Wallace. This is Mr. W. K. Wallace, the Western Manager.

Q. He said, "Let's get the term 'cost of production' defined"?

A. Yes, to avoid any future controversy. I said, "I still can't recommend 78 cents increase." And

(Testimony of C. Bruce Flick.)

Williams said he was going back to New York on February 14th and would like to get a final decision as to whether we were going to get along with them, go along with them in this application to OPA for 78-cent increase. That is the substance of that conversation on February 10th.

Q. What is the next discussion or communication of any kind you had with any representative of the defendant with reference to this subject?

A. On February 15th Mr. Wallace, I have a note here that on February 14th I telephoned to Wallace but he had gone to Modesto. Williams was catching a train for New York. That was done because Williams had asked me to give them the final decision before he went back to New York, but I was not able to catch him before he left.

On February 15th, Mr. Wallace telephoned to me and I said, "Why don't we let your auditors, Peat, Marwick & Mitchell, and let our auditors, Price, Waterhouse & Company, get together and [142] select a third person, let him arbitrate.

Mr. Rosenberg: Pardon me for interrupting. May I have the purpose of this testimony?

Mr. Bennett: It is to show the statements of the parties—

Mr. Rosenberg: To show there was a difference of opinion between—

Mr. Bennett: I want to show the declarations of these parties. It seems to me to be in issue, and I think without repeating what we repeated so many times, the nature of this case, the controversy.

(Testimony of C. Bruce Flick.)

before the court, that these conversations and the actions of the parties involved in this case should be before the court.

'The Court: Proceed.

Mr. Bennett: May I have the reporter read the last two or three lines?

(The record was read by the reporter of the witness' last answer.)

The Witness (Continuing): "Let them select a third party to arbitrate the question of the correctness of the increase of 78 cents per ton, and at the same time to make a definition of the term 'actual cost of production,' that we could follow in the future, actual cost of production." I said Pacific would be willing to abide by the findings of the arbitrator, and we would split the cost of the arbitration [143] between us. I said, "It seems to me the definition of cost ought to be made a part of the contract in the appropriate manner, and there ought to be provision to have the escalator clause operate downward as well as upward."

Wallace said, "That sounds reasonable," and he said he would wire it to Williams on the train so he would have it when he got to New York. That is the substance of that.

Q. At the time of this discussion I think counsel will agree the terms of the contract only operated upward, as far as the escalator clause was concerned; the escalator clause never worked downward, did it?

A. No; the escalator clause was only working upward, which was one of the reasons as an ac-

(Testimony of C. Bruce Flick.)

countant that I considered that the accounting practice they were using was improper to interpret under the contract.

Q. Well, as I understand it, at the previous conversation Wallace or Williams had suggested that perhaps they would consider a revision of the contract, the provision for the escalator clause working downward as well as upward.

A. Yes; that was the impression I had from my conversation with them, it seemed to be reasonable.

Q. Let's go to the next conversation you had with either of these parties, or with any representative of the defendant.

A. On February 17, 1944, Mr. Wallace came to my office, bringing a telegram that he had from Mr. Williams, and he showed [144] that to me and in that wire Mr. Williams said that he would refuse to arbitrate because Peat, Marwick & Mitchell were insisting that their accounting practices were correct, and Williams said that was a matter for the executive committee of Westvaco, that he personally would vote in favor of shutting down the gypsum production as an unprofitable operation unless we were willing to go along with them and accept 78 cents a ton increase in cost, and he asked for a final decision. I said I was sorry they wouldn't arbitrate, because it seemed a fair and easy way to resolve a difference, and if a qualified man selected by Peat, Marwick & Mitchell and Price, Waterhouse would decide that Westvaco was

(Testimony of C. Bruce Flick.)

right we would be entirely willing to pay the increased price.

Mr. Wallace said Westvaco could not accept the arbitration because if it were decided against them they would be compelled to produce gypsum at a loss.

I said, "I think you are actually making a lot more money than your books show, because of your incorrect overhead allocations." Wallace said, for example, as an illustration of an item, he mentioned the plant guards, which was required by the Government. I said, "Gypsum is not a critical war product requiring plant guards." I said, "Guards must be required because the magnesium oxide and bromine and I don't think any part of the plant guards should be charged to this by-product gypsum." I pointed out to them, this was on the [145] subject of them stopping making gypsum, that the magnesium oxide would have to bear all their overhead cost. Wallace said, "Well, the studies show they would save money by stopping gypsum, discontinuing gypsum." I said, "I don't think you will on an out-of-pocket basis." Wallace said, "We hope we won't have to discontinue, or talk about discontinuing." I said I doubted whether you have a right to discontinue gypsum production because of this contract. Wallace said, "We will check with our attorneys." I said, "I will take it up with my management the question of our final decision, because you have refused an offer to arbitrate, and I will have to check with my superior." Both Wal-

(Testimony of C. Bruce Flick.)

lace and myself, as usual, expressed a desire to continue satisfactory relations under the contract. That is the substance of that conversation.

I did not quite understand Mr. Wallace's reference to gypsum as a loss, because of the overhead cost figure.

The Court: Is that all of this matter?

A. That was the substance of the February 17th conversation.

Mr. Bennett: I wanted to get a piece of chalk, your Honor.

The Court: I suggest you conclude with this and then you can come back.

Mr. Bennett: Except at this point I would like to have some figures in mind, but we can come back.

Q. Now, at the time, and according to the figures that were furnished you by the defendant then, Mr. Flick, what was actual [146] or direct cost of manufacturing the gypsum at its point of separation?

A. The actual or direct costs were a dollar a ton. That was the 1943 average, which we were discussing after the turn of 1944.

Q. That figure of \$1, you say, was the figure for twelve months?

A. Correct. For the year 1943 was their direct charge shows \$1 per ton, that is for labor, material—

The Court: Covering what period?

A. The calendar year 1943. The figure covered for the calendar year 1943, their average cost for the year 1943 was \$1 per ton direct charges.

(Testimony of C. Bruce Flick.)

The Court: And how much was the first year?

Mr. Bennett: That was the figure for which they were claiming this additional increase of 76 cents?

A. Yes, 78 cents. They were claiming an increase of 78 cents because they claimed there had been an actual advance in cost of manufacture from the calendar year 1942's cost and the cost for the calendar year 1943.

Mr. Rosenberg: May I interrupt? It is your statement now, Mr. Flick, that the only costs of production that you think were allowable costs for the year 1943 amounted to \$1?

Mr. Bennett: Well, the figure was—

Mr. Rosenberg: Let him answer it.

The Court: Well, clear it up. [147]

The Witness: I can answer it. The thing I was concerned with was not the cost charge, at that particular year. What I was concerned with under the contract was the actual advance in cost of manufacture comparing two 12-month periods. Now, for the year 1942, Westvaco showed a total cost with everything in there, overhead and all, of the 12-month period. Now, for the year 1942 Westvaco showed a total cost of everything in there, overhead and all, of \$1.93 per ton; for the year 1943 they showed a total cost of overhead and everything else of \$2.71, a difference as shown by Westvaco of 78 cents per ton. Between 1942 and 1943 that is a 78-cents-a-ton price difference they were asking for. On direct charges which I was

(Testimony of C. Bruce Flick.)

prepared to go along with—it was this: The direct charges for 1942 were 71 cents per ton of gypsum, and for 1943 the direct charges were \$1 per ton of gypsum, a difference of 29 cents a ton in the direct charges, which we were quite willing to pay, but Westvaco, in other words, was claiming a price of \$3.76, as shown—

Mr. Rosenberg: I understand that. All I was doing was attempting to clarify the point, you did not contend then and you don't contend now that the allowable, even under your version of the contract, that the allowable costs of production of gypsum in 1943 was only \$1 a ton.

A. I can't answer it "Yes" or "No," because of this reason: My job as an accountant here was concerned with the actual [148] advance of cost of production.

The Court: How can you say in 1943 it was \$1?

A. Westvaco's figures show that direct charges are labor, materials, power, fuel for 1943 was \$1 per ton, and for 1942 they showed 71 cents a ton, an increase of 29 cents per ton. What I am concerned with primarily is the advance, the actual advance in cost of manufacturing.

Q. But you conceded then and you concede now that even under your interpretation of the contract that the cost of producing this gypsum was more than \$1 a ton in 1943, and more than 71 cents a ton in 1942; is that right?

A. My position then was and still is that the only cost—at any rate, that costs of producing

(Testimony of C. Bruce Flick.)

this by-product gypsum under this contract for any 12-month period, for the purpose of comparing it with the preceding 12-month period for the purpose of ascertaining the actual advance in cost of manufacture would be direct charges for labor, material, power, fuel, supplies, for running that little gypsum department, where you dry and grind and ship this by-product, gypsum.

Mr. Rosenberg: Q. Well, you still have not answered the question, but I guess I am not going to get it. [149]

The Court: You at the outset indicate the cost of—what is this you have?

The Witness: These are figures furnished by Westvaco.

The Court: The cost of gypsum in 1943 was \$1?

A. The direct charges which they charged to gypsum in 1943 was \$1.00 per ton, yes, sir.

Q. Explain that to me.

A. Now, that \$1.00 per ton is composed of labor in operating the gypsum department there, the drier and grinder, 39 cents a ton; labor for repairing that equipment, 16 cents a ton; workmen's compensation insurance and social security taxes, 3 cents a ton; operating material and supplies, 2 cents a ton; repair material and supplies, 7 cents a ton; water, 1 cent; power, 18 cents a ton; gas, 14 cents a ton; total direct charges, \$1 a ton.

Q. Made up of those items? A. Yes, sir.

The Court: Does that explain it, counsel?

Mr. Rosenberg: No, it does not, your Honor. What I am trying to get the witness to say---in

(Testimony of C. Bruce Flick.)

other words, as I understand counsel's question, it is for the purpose of testing whether or not, if Westvaco discontinued selling gypsum at \$2.98 a ton, they would have sustained a loss. Now, I submit that that is incompetent in any event, because the question is what price were we entitled to under the contract. [150]

The Court: That is why I am allowing this testimony to go in, to find out.

Mr. Rosenberg: Yes, but for that purpose, then, I am trying to get the witness to say whether or not as an accountant he is contending that our total cost of producing gypsum, according to his version of the contract and good accounting practices, was only \$1 a ton in 1943. He should be able to answer that.

The Court: We are going out of bounds entirely. It was only because I wanted to clarify it. You will have an opportunity to cross examine.

Mr. Bennett: That is what I was going to suggest.

Q. In that \$1 a ton, they did not add shipping expense, did they?

A. That \$1 a ton did not include shipping expense. There was an additional shipping expense, but the shipping expense for the year 1942 was shown by them as 19 cents a ton and for the year 1943 was likewise 19 cents a ton, so they did not show any increase in shipping expense as between those two 12 months' periods.

Q. You are not questioning, or to state it other-

(Testimony of C. Bruce Flick.)

wise, state to the Court whether or not the shipping expense would be considered by you as an accountant and in relation to your position representing the plaintiff here, as being an item of cost included within the cost of production as that term is [151] use, in paragraph 6 of the contract.

A. Well, the contract uses the words "actual advance in the cost of manufacture."

Q. Yes.

A. Ordinarily an accountant would not consider that shipping expense was a manufacturing expense, but the contract does provide for a price per ton loaded bulk on board the cars at their plant at Newark, and we were quite willing to accept, therefore, shipping expense as if it were manufacturing expense because we felt that that was fair enough. We were talking about an escalator clause and a price loaded on board f.o.b. cars and so we were willing to say the cost should be the cost loaded on board cars. We were willing to accept direct shipping expense. Indirect or allocated shipping expense is different.

Q. What did you say the shipping expense is there? A. 19 cents.

Q. So with the direct items, in accordance with defendant's figures for that year 1943, the direct costs \$1.00 plus 19 cents shipping, make a total of \$1.19? A. \$1.19.

Q. That is your cost. Now, what did the defendant claim for 1943 as their total costs, including the allocation and the claimed cost of these

(Testimony of C. Bruce Flick.)

overhead and indirect items pursuant to their so-called national uniform system of accounting?

A. They claimed the total cost of \$2.71 a ton for the calendar year 1943.

Q. At that time that you were discussing with Mr. Wallace, you had agreed, as I understand it, to this 29 cents raise of their actual cost of manufacture, had you not?

A. Yes, we had no objection to the 29 cent increase.

Q. Or a total price to pay the company of—

A. \$3.27.

Q. \$3.27?

A. We were quite willing to pay \$3.27.

Q. Now, taking their total cost, then, as represented to you and claimed by their figures, everything, the indirect overhead of \$2.71, deducting that from \$3.27 left, even according to their own paper figures, a profit of 56 cents a ton, did it not?

A. That is correct.

Q. And yet Mr. Williams at that time threatened to shut down the plant because they could not operate at a profit?

A. That is correct.

Q. That is, they were threatening to put the gypsum, instead of selling it to you at \$3—

Mr. Rosenberg: Just a moment. That is found to be leading.

Mr. Bennett: Yes, it is. I withdraw the question. I think the facts speak for themselves. [153]

Q. Just to get back to the evidence, as I understand it, on February 17, Wallace said what with

(Testimony of C. Bruce Flick.)

reference to meeting their demands that they would do if you refused to meet their demands?

Mr. Rosenberg: That has been asked and answered. He is asking him to repeat something—

Mr. Bennett: Well, it is. Because of the subsequent colloquy and arguments here, I did not know but what we might have confused His Honor and I did not want to have it result in that.

The Witness: Well, he said their studies showed if they cut out the gypsum they would save money.

Mr. Bennett: Q. I understood something was said concerning a possible—

A. Mr. Wallace said they could not accept the arbitration that we proposed because if they lost the arbitration they would be in the position of being compelled to produce gypsum at a loss.

Q. Was anything said at that conversation with reference to refusing to deliver or produce gypsum?

A. Williams said in his telegram, which Wallace showed to me, that Williams would vote in their executive committee meeting in New York in favor of shutting down the gypsum production unless we would go along with them and accept the entire increased price of \$3.76 a ton.

Q. Did that complete your February 17 conversation with Mr. [154] Wallace? A. Yes.

Q. When is the next communication you had with the defendant or its representative with reference to this controversy?

(Testimony of C. Bruce Flick.)

A. We wrote them a letter on February 28, 1944.

Q. I hand you herewith a copy of a letter and ask you if the original of that letter dated February 28, 1944 was addressed to Mr. W. K. Wallace, Western Manager, Pacific Chlorine Products Corporation at Newark, California.

A. That is a copy of the letter.

Mr. Bennett: I offer this letter in evidence as the next exhibit in order.

The Court: Let it be admitted and marked.

(The document in question was thereupon received in evidence and marked Plaintiff's Exhibit No. 6.)

Mr. Bennett: I read the letter, your Honor, addressed, as I have previously indicated:

"By letter dated January 14, 1944, you advised us that 'the actual advance in Westvaco Chlorine Products Corporation's cost of production on gypsum for the 12 month period commencing January 1, 1943 and ending December 31, 1943, over the 12 month period commencing January 1, 1942 and ending December 31, 1942, was 78 cents per ton,' and gave us notice that commencing on the 15th day of March 1944 the price to be charged for all guysum delivered to us by you would be \$3.76 per ton. You also [155] advised us that an application will be made to the Office of Price Administration for an order confirming and authorizing the above increase in price.

"Since that time a number of conferences have been held between your representatives and our

(Testimony of C. Bruce Flick.)

own for the purpose of determining whether or not the facts actually entitle you to such an increase under the provisions of our contract.

“During these conferences we have indicated to you that we consider that you are entitled to some increase based upon your representations as to your accounting and operating practices, but we question that the facts entitle you to the entire amount for which you have asked.

“We could not represent to the OPA that if an increase in the maximum price is granted to you, we would not ask for an increase in our resale price.

“In view of your desire for an early determination of your right to an increase under the contract and our mutual inability to agree as to the underlying facts, we advised you of our willingness to arbitrate any questions which might exist between us, but this we understand you have refused to do and have asked us for our final decision. In answer to this, we must tell you that we have at all times been and now are willing to carry out our obligation under the contract, and hereby renew our offer to take all reasonable steps to have any questions which might exist between us determined by any reasonable method or in any reasonable manner. [156]

“Very truly yours,

“Pacific Portland Cement Co.,

“By C. B. Flick,
Controller.”

(Testimony of C. Bruce Flick.)

Q. Following that letter, or on the same day, was there a further conference or any communication between you and any representative or representatives of the defendant corporation?

A. On the same date, February 28, 1944, Mr. W. K. Wallace, the western manager of the Westvaco, came to my place and said if we won't go along on this price increase of 78 cents a ton, and if we won't give them a letter stating we will not ask the OPA to authorize any increase in our own resale price, then they will suspend deliveries and discontinue production of gypsum on March 1, 1944. Wallace told me in their experience with the OPA, where the buyer signified a willingness to absorb the price increase and not pass it on to his customer, the OPA would act quickly, and maybe they could get their application approved in two weeks, but where the buyer was going to pass on the price increase to the consumer, that OPA was much more difficult to approve and that OPA would take maybe four months to render a decision in the matter, and that Westvaco was not willing to absorb what he called a loss on the gypsum for any additional period of time.

I said, "How can you suspend deliveries on March 1? On what ground?"

Wallace said, "Because we would not go along with them on [157] the price increase."

And I said, "Under any circumstances you are not entitled to a price increase until March 15 because we have our 60 day notice from January

(Testimony of C. Bruce Flick.)

14 to March 15. You are not entitled to suspend gypsum."

Wallace said, "I will recheck with Williams in New York. Maybe I misunderstood and maybe I was supposed to tell you this not later than March 1."

And he said they had four different procedures of which they might avail themselves. Discontinuing deliveries was only one thing they might do.

I said, "What are the other things?"

He said, "I neglected to find out from Williams."

Wallace said, "If Pacific applied to OPA for authority to pass on the price increase to Pacific's customers, that OPA would probably turn it down because of the fact that Pacific would still have a profit in dealing in the gypsum, and that if Westvaco would discontinue production, that might help to speed up the OPA action because then it would show that the price increase was necessary in order to maintain the production of gypsum."

Well, Wallace also said that they did not have to make gypsum. They might precipitate two other commodities in place of gypsum, and they would make more money doing it. He said he would send a long airmail to Williams in New York, the letter [158] just referred to here of the same date, February 28, 1944, and that he would phone me on March 1st, expecting to have a reply. And I said, "I will tell my management what you have said." That was the substance of that conversation.

(Testimony of C. Bruce Flick.)

Q. What was the next communication or conversation you had with the defendant or any representative concerning this same subject-matter? To save time, Mr. Flick, I hand you herewith a letter dated March 2, 1944, on the letterhead of Westvaco Chlorine Products Corporation, Cable Caustic, New York.

“Please reply to Chrysler Building, 405 Lexington Avenue, New York 17, New York. March 2, 1944.” Addressed to: “Pacific Portland Cement Company, San Francisco,” and signed, or purported to be signed by Max Seaton, Executive Vice President. Did you receive the original of that letter from Mr. Seaton shortly after the date thereof?

A. Yes, we received the original of this letter. I remember that.

Mr. Bennett: I will offer this letter in evidence, if your Honor please.

The Court: It may be admitted and marked Plaintiff's exhibit next in order.

(This document in question was thereupon received in evidence and marked Plaintiff's Exhibit No. 7.)

Mr. Bennett: The letter reads as follows, your Honor: [159]

“This will acknowledge receipt of your letter of February 28th, addressed to our Western Manager, Mr. W. K. Wallace, which Mr. Wallace has forwarded to this office for attention.

(Testimony of C. Bruce Flick.)

“Our advice to you in our letter of January 14, 1944, concerning an increase in the price of gypsum, was made in accordance with the provisions of our contract and our books of account which disclose the cost elements which make up this increase are, in accordance with our contract, open to your inspection. In consequence, we see no reason for submitting this question of price increase to arbitration.

“It had been our intention to apply to the Office of Price Administration for an increase of the Maximum Price on our gypsum delivered to you under our contract of January 29, 1937. However, in view of your indication as to your inability to represent to the OPA that an increase in our price to you would not result in an increase in your resale price, we do not feel that such application is warranted.

“Because of the prohibition against our advancing the price of gypsum in accordance with the provisions of our contract of January 29, 1937, we hereby notify you that on March 15th we shall suspend the delivery of gypsum to you until such time as it is possible to invoice deliveries [160] at prices adjusted in accordance with the terms of that contract.

“Very truly yours,

Westvaco Chlorine Products
Corporation,
Max Y. Seaton,
Executive Vice President.”

(Testimony of C. Bruce Flick.)

Mr. Bennett: Q. Did you reply to that letter, or to your knowledge did any representative of the plaintiff reply to it?

A. I believe the next thing that happened after that letter was my phone call to Mr. Wallace on March 10, 1944. I said, "If you suspend deliveries what are you going to do with the gypsum?"

And Wallace said, "I don't know. I haven't heard from New York."

And I said, "Have you got any objection to my calling Dr. Seaton, myself, on the telephone?"

And he said, "No objection whatever."

So I called Dr. Seaton on the telephone the same day and told him we had just gotten this letter of March 2, 1944 on March 7th, and that our executives were up in Oregon for the past three weeks.

The Court: Pardon me.

The Witness: I said we had just gotten his March 2nd letter. We received it on March 7th, and our executives had been up in Oregon for the past three weeks, and it somewhat handicapped us in our handling of the matter. I told Dr. Seaton [161] I had asked Wallace what they were going to do with the gypsum, and whether they were going to discontinue production of it altogether, or what, and Wallace had given me approval to call Dr. Seaton direct.

Dr. Seaton said, "I really don't know at this point."

I said, "Well, of course, we take that March 2nd letter of yours as a formality because we certainly

(Testimony of C. Bruce Flick.)

want to continue on and I think you people do. I think both parties want to continue on under the contract."

And Dr. Seaton agreed as a general principle and said they felt it necessary to put themselves on record in the matter. .

I said, "Our executives being away, and the delays that have happened, won't you postpone the discontinuance of the production of gypsum until you get out here?"

He was expecting to come to San Francisco in April.

"And let us discuss the whole matter with Dr. Seaton when he gets here in April."

He said, "Well, my travel plans are indefinite, as all such plans are because of war conditions. I do not see any reason in deferring it. It should be faced squarely now."

I said, "I will try to get in touch with my people."

That was the substance of the conversation of March 10th.

Mr. Bennett: Q. Did you make any further communication or have any further communication with the defendants?

A. I phoned Mr. Wallace on March 11th and I said, "Now, here, [162] we will go along with you fully in your application with the OPA in order to get you over this hurdle of a price regulation, a frozen Maximum Price, because we recognize that we can go to the OPA for a \$3.76 ceiling price

(Testimony of C. Bruce Flick.)

or maximum price, but under OPA regulations you can always change a lesser price, and in order to get over this OPA thing which is stopping you, we will go along in your application to OPA, but with the understanding that after we get the OPA approval for a \$3.76 maximum price we will decide and work out what the actual price to be charged should be."

And I said also, "You are asking us to give up our right to pass that increase along to our customers. You are asking us to go on record with the OPA that we will absorb this price increase and for us to tell the OPA that we won't pass it on to our customers. Now, you are asking us to give up something. How about some consideration for giving this up? It seems to me this escalator clause ought to work downward as well as upward. It seems to me under any circumstance we do not want to go along with having this 11 cents a ton for new products research as a part of the maximum price, and I think we ought to go further into this question of getting this difference ironed out and get this term 'cost of production'—our differences on that ironed out for the future so we will go along and get away from all this dispute and discussion."

I asked Wallace if he had any objection to my phoning [163] Seaton. Wallace said he would rather phone, himself. He was anxious to get the matter straightened out, and he thought he might be able to sell Dr. Seaton better than I could, and

(Testimony of C. Bruce Flick.)

so he said he would call him up and let me know after he did so. That was the substance of that conversation.

Q. What was your reason for being willing to go along with him, or, rather, have you fully stated your reasons for finally acceding to their demands to agree with OPA that you would not increase your prices if OPA granted them a maximum price increase?

A. We, naturally, having this long term arrangement to buy this by-product gypsum, we were obligated under the contract to buy all of it, except the 4000 tons. We had made plans and commitments of our own for the use and disposal of this shipment, and we did not want them, frankly, to discontinue its production.

Q. As had been threatened?

A. They were giving us notice that they were going to discontinue the production unless we went along and paid them the price they wanted. We did not want them to discontinue the production. Basically, that was the reason we were willing to go along. We did not want them to discontinue production. We had plans for it. We had commitments for it. And we did not feel that—we did not like the idea of having to give us our right to pass on an increased price to our own [164] customers, but we thought if we could get them to agree that the escalator clause should work in both directions instead of just moving upward, that maybe we could trade a little bit on that, but the real reason

(Testimony of C. Bruce Flick.)

we went along on that application for maximum price of \$3.76 was because we did not want them to stop making gypsum.

Q. And you reserved the right—

Mr. Rosenberg: Mr. Bennett—

Mr. Bennett: All right.

The Court: It is time for recess.

(Recess.)

Mr. Bennett: Mr. Flick, I show you a copy of a letter dated March 11, 1944, addressed to the Westvaco Chlorine Products Company, New York, New York, attention Dr. Max Y. Seaton, Executive Vice President, purporting to be signed by Pacific Portland Cement Company, by C. B. Flick, and also another letter addressed to the same parties and the same date, purporting to be signed by you and ask if the original of those two copies were sent to the persons to whom they were addressed on or about that date?

Mr. Rosenberg: I will stipulate they were.

The Court: It is stipulated.

The Witness: A. Yes.

Mr. Bennett: I offer this letter, or these two letters in evidence as the Plaintiff's next exhibit.

The Court: Admitted and marked.

(The letters referred to were marked Plaintiff's Exhibit 8 in evidence.)

Mr. Bennett: The first letter addressed to Dr. Seaton, Executive Vice President, reads:

(Testimony of C. Bruce Flick.)

“Air Mail

March 11, 1944

“Westvaco Chlorine Products Corporation

Chrysler Building

405 Lexington Avenue

New York, New York

Attention: Dr. Max Y. Seaton, Executive Vice-
President

Gentlemen:

This is to confirm telephone conversation today between the writer and Mr. W. K. Wallace, your Western Manager, in which we agreed as follows:

1. You will proceed at once to file your application with the Office of Price Administration for an increase to a maximum price of \$3.76 per ton for your gypsum delivered to us under our contract of January 29, 1937, effective on March 15.

2. Enclosed is a letter which is to be attached to your application to O.P.A. in which we agreed to a maximum price of \$3.76 and state that we will not ask O.P.A. for a corresponding increase in our resale price.

3. In anticipation of O.P.A. approval of your application, which will make it possible for you, effective on and after March 15, to invoice deliveries at prices [166] adjusted in accordance with the terms of our contract, you will not suspend delivery of gypsum to us.

4. The escalator clause in the contract is interpreted to operate downward as well as upward.

(Testimony of C. Bruce Flick.)

5. When Dr. Seaton is here in April, we shall negotiate the question of interpreting the term 'cost of production' so that any and all questions shall be determined as a basis for adjusting prices in future in accordance with the contract, and to determine whether any price less than \$3.76 should be charged during 1944.

Very truly yours,

Pacific Portland Cement Co.,
By C. B. Flick,
Controller."

The second letter of the same exhibit, same date, refers to the same Dr. Seaton, Vice-President of the defendant, and reads as follows—this is the letter, your Honor, that they had requested to be sent so they could send that to the Office of Price Administration:

"Referring to our contract dated January 29, 1937, you have advised us that your cost of producing gypsum has increased and that pursuant to the provisions of the contract you are entitled to an increase in the price of gypsum delivered to us, effective on March 15, 1944, to \$3.76 per ton. [167]

"You have also advised us that you are filing an application with the Office of Price Administration for an order authorizing the above increase in permitted maximum price.

We agree that if this price increase is allowed by the Office of Price Administration, we shall not ask the Office of Price Administration for any in-

(Testimony of C. Bruce Flick.)

crease in the prices to be charged by us to our customers for any of said gypsum received by us from you.

Very truly yours,

Pacific Portland Cement Co.,

By C. B. Flick,

Controller."

On the same date, about that time, did you have a further conversation with Mr. Wallace, or anyone representing the defendant corporation?

A. On the same date, March 11, I telephoned Mr. Wallace and we agreed over the telephone along the lines of these letters. I then made the letters up and then I called Wallace back on March 11th and read the letters over the telephone, and he said they were okay, and then I put them in the mail to Dr. Seaton. On March 13th—the letters having been sent airmail, on March 13th Wallace telephoned me and read me a telegram that he had received from Dr. Seaton, stating that he had received my letter of March 11 and the Westvaco were going to go ahead and file the application with OPA and pending decision by the OPA Westvaco [168] would continue to deliver gypsum to Pacific. He said he was confirming my letter.

Q. That was on March 11, 1944?

A. March 13th.

Q. Did you receive any information from the defendant as to—

Mr. Rosenberg: Pardon me. Did he say he re-

(Testimony of C. Bruce Flick.)

ceived the letter from Dr. Seaton in response to that?

Mr. Bennett: No.

The Witness: Dr. Seaton—Wallace told me Dr. Seaton was writing to me. There was a letter that came in after that from Dr. Seaton.

Mr. Bennett: Well, here it is.

Mr. Rosenberg: Will this be admitted in evidence?

Mr. Bennett: I offer as Plaintiff's exhibit next in order letter written by Dr. Seaton, of New York, dated March 13, 1944, to Pacific Portland Cement Company, Attention Mr. C. B. Flick.

The Court: Admitted and marked.

(The document was marked Plaintiff's Exhibit 9 in evidence.)

Mr. Bennett: I will read the letter:

"We are in receipt this morning of your letter of March 11 with reference to the question of gypsum price increase which has been under discussion with you.

"In view of your letter and of the attached letter, which we may use as an exhibit in our application for gypsum price adjustment to the OPA, we will not suspend delivery [169] of gypsum to you on March 15, as my letter of March 2 indicated we would, but will continue to deliver as in the past pending determination of the OPA's decision on our price increase application which will be before them within the next few days.

(Testimony of C. Bruce Flick.)

“My present plans call for me to reach California during the week of April 9th and during my stay in the West I will be very glad to discuss with you the development of more precise understandings regarding the meaning of the term ‘cost of production’ which is included in our contract with you.

Very truly yours,

Westvaco Chlorine Products
Corporation,
Max Y. Seaton,
Executive Vice President.”

Q. Did you have any meeting with Dr. Seaton after that, Mr. Flick? Did he come out to California?

A. He did come out about the middle of April and we had a conversation with Dr. Seaton, and we went all over the same ground that I had been over with Wallace and Williams; we discussed the by-product question and we discussed what should be charged on the costs of production, and so forth, and the net result of the conversation was nil. He reiterated Westvaco's position, that they were entitled to keep their accounts by the uniform accounting system, and that although the contract may have referred to gypsum as a by-product in their accounting [170] system they did not recognize any special treatment for by-products as distinguished from what they call joint products or co-products, and they were entitled to the full \$3.76. I argued with him quite a bit about it, about

(Testimony of C. Bruce Flick.)

the new products research, for which they charged 11 cents a ton increase in the price, and he maintained that in the Westvaco practice that they allocated new products research along with all the other overhead, and we just did not get anywhere. We later had a brief conversation in Mr. McCarthy's office with Dr. Seaton—

Q. Who is Mr. McCarthy?

A. Mr. J. McCarthy, the president of the Pacific Portland. I was present. I am quite sure Mr. Wallace was present—Mr. Wallace, Mr. Seaton, Mr. McCarthy, and myself, and they talked generally about the desire of both parties to get along under the contract and live together in an amicable manner, and so forth, and Mr. McCarthy was going East, but nothing ever came of that.

Q. You later advised—I think before we start that—Counsel, we can stipulate that OPA did not grant the price increase?

Mr. Rosenberg: That's right.

Mr. Bennett: You continued to make deliveries at the so-called freeze price?

Mr. Rosenberg: \$2.98.

Mr. Bennett: I am going to touch now on a subject that does not particularly relate to this paragraph 6, Raise in [171] price, and so forth, your Honor, but it follows along chronologically, and for that reason I will pass to that particular subject now.

Q. Did you have any further conversation in 1946, the month of June, with any representatives

(Testimony of C. Bruce Flick.)

of the defendant with reference to any matters in this contract under question or dispute, or pertaining to the contract, Mr. Flick?

A. In June of 1946, or the 13th of June, Mr. Wallace and Mr. Kenneth Ray came to my office.

Q. Pardon me. Is that the same Mr. Ray who is counsel for the defendant?

A. Yes, and brought up the subject of the specifications of gypsum and deductions from our remittances which we had been accustomed to make each month for any gypsum that might be below 95.51 percent gypsum value. They said Westvaco had never accepted the charge-backs and that they had been accumulating on their books, the deductions which we had made, that they did not consider correct, and that they had a balance as an account receivable due from Pacific in the neighborhood of \$9500.

I said, "That is the first time I ever knew that you fellows had any such account on your books that you consider as being due from us." Mr. Ray said that annual statements had been sent to Pacific, either by one of the accountants or by their auditors, Peat, Marvick & Mitchell in the course of auditing confirmations, and he believed the statements had [172] been returned. I said I never saw any such statements, I never saw any audit confirmations, and while Mr. Wallace and Mr. Ray were there I called on the telephone Mr. Schoning, our assistant secretary and the man in the accounting department, who handles some accounting de-

(Testimony of C. Bruce Flick.)

tails, and he would be the one most likely to see them. He said he never saw any such statements. I said, "I have never before been advised of the existence of this claim," that Mr. Wallace had been coming in to see me frequently in 1944, and at intervals thereafter, and had never mentioned the matter of having an account due on their books, that monthly checks with the deductions had always been cashed. Wallace said, "Well, we will write you a letter and discuss this claim and Mr. Ray will discuss the matter later on as to the contract and the reasons why Westvaco considered the charge-backs wrong." And he told me Mr. Ray would prepare such a letter on his return to New York.

Q. Did you ever receive such a letter from Mr. Ray?

A. I don't recall receiving a letter from Mr. Ray on the subject. Mr. Wallace subsequently did come in with statements.

Q. That is a statement claiming how much?

A. I believe when they sent this statement they finally had an aggregate sum of \$11,000.

Mr. Bennett: Now, for your Honor's information, this is the matter that is involved in the second count of the complaint. Your Honor is familiar with that paragraph, paragraph 5 of the [173] contract, if the gypsum content falls below 97.51 percent, they are subject to a 2 percent tolerance, the plaintiff may deduct 10 cents per ton for each percentage that it falls below.

(Testimony of C. Bruce Flick.)

Subsequently, in connection with that, did the defendant ever reduce its claim to a less sum than this \$11,000, or \$8,000, whatever it was?

A. They subsequently did. I believe their present claim is something like \$1600.

Mr. Rosenberg: \$2100.

The Witness: \$2100?

Mr. Bennett: Q. As I explained to the Court, you have since tendered a check for \$500 which was for what purpose?

A. It was brought to my attention that there were some deductions that seemed to have been made for gypsum which was below 97.51 percent, although it was still above 95.51. The contract said that the gypsum, if the gypsum is below 95.51 you have this charge-back privilege, but when you compute the amount charged back, or the amount of the charge-back, you go back up to the amount below 97.51—it is a little confusing. It was called to my attention some deductions seemed to have been made for gypsum that was off about 2 percent, so I had the boys in the accounting department make a thorough check going back to the end of 1940, and went right through in detail and we found there seemed to have been quite a little period of time in there when one of the clerks in the accounting department [174] seemed to have been confused, and he was charging back every bit of gypsum that was below 97.51, even though it might be up to 96.51. Then we tendered a check in the amount of around \$525, some such figure, coun-

(Testimony of C. Bruce Flick.)

sel advised me that about half of it had been outlawed by the statute of limitations, but we said we will skip that, and we tendered the check for the entire amount, and Westvaco had sent it back and said that we had breached the contract, because of making these erroneous deductions, and we sent it back again to them without prejudice, and they said that that was one of the issues involved in this suit, so they did not take our check.

Mr. Rosenberg: That was by letter, wasn't it?

A. Yes.

Mr. Rosenberg: They also said that the further reason for not accepting the check was that the computation was made on the basis of Pacific's chemical analysis, whereas we were contending our chemical analyses were correct; isn't that correct?

A. I don't recall exactly what was in that last letter.

Mr. Bennett: If you are concerned about that point let's get the letter, counsel.

The Witness: I have the letter.

Mr. Rosenberg: Here is the letter.

Mr. Bennett: Do you want the letter in? I have no objection.

Mr. Rosenberg: No. [175]

Mr. Bennett: Why make so much ado about nothing? I perhaps should not have gone on to this chronologically, but I thought in passing it was a small matter that we might dispose of.

Mr. Rosenberg: You mean the cost of production dispute?

(Testimony of C. Bruce Flick.)

Mr. Bennett: Yes, the dispute with reference to the books.

The Court: They spread between the \$500 and \$2100.

Mr. Bennett: That is the issue involved in the second count. I have got that letter, and I have the attached check. Really, this is the defendant's case. I don't know, I am perhaps making a mistake in bothering with it at this time, because it is really the defendant's case, and maybe it is technically a mistake for me to be offering the document that is really a part of the defendant's case, and I will submit to your Honor that any documents we have, of course, would be available to them in that connection.

Q. The difference of the total claim that they are making now for alleged excessive deductions is \$2120.42, of which you tendered, you say, \$539.24, which you have discovered as error in the manner in which you have explained it, and that leaves as claimed here a sum of \$1620.42, on deductions that you made which involves the dispute which in turn involves the sum of \$1620.42, and were made pursuant to—

A. Well, the contract carries that clause.

Q. You are referring to the provisions of paragraph 5 of the [176] contract?

A. If that was the proper number of it. It provides on any gypsum which has a gypsum value of less than 95.51 percent we may make a deduction of 10 cents per ton for each percentage, that it

(Testimony of C. Bruce Flick.)

falls below 97.51, so that these charge-backs or deductions in our monthly remittances were computed by our accounting department each month based on reports of chemical analyses of the gypsum which we received from our plant laboratory at Redwood City plant.

Q. Prior to the time Mr. Ray and Wallace came to see you in June, 1946, you had sent regularly or monthly or other periods of time checks to them as payment for the period that you have received gypsum during the preceding period?

A. We had sent checks every month. The contract provides, as I recall it, for the payment by the 15th of each month for the gypsum delivered during the preceding calendar month, and it had been our custom to send checks each month, and we accompanied the checks with a little list if there were any of these charge-backs, and we deducted the amount of these charge-backs and sent a check for the net amount, the amount billed by Westvaco, less the charge-back.

Q. Were those checks cashed by the defendant?

A. Yes, they were all cashed.

Q. Prior to Mr. Ray and Mr. Wallace visiting your office on June 6th had anyone representing the defendant questioned the [177] amount by you or the propriety of these deductions in the amount of the check that was sent, which was cashed?

A. No one from Westvaco ever asserted any claim to me. Mr. Wallace stated on numerous occasions that they did not like the fact that deduc-

(Testimony of C. Bruce Flick.)

tions were made, that their New York office did not like to see deductions made, and they thought wherever we could use the gypsum by disposing of the gypsum without having somebody make a deduction from us, that we ought not to make that deduction from Westvaco. I replied, "Well, the contract provides for it." No claim was ever asserted until Mr. Wallace and Mr. Ray came into my office and told me they had this amount open on their books. I was quite surprised. [178]

Q. Where did these samples come from that were examined, upon which you made or determined the amount, if any, of deductions?

A. We received samples at our laboratory, at our plant at Redwood Harbor, California, from two sources. Most of the samples came from Westvaco. They sampled the gypsum as shipped from Westvaco to wherever we told them to ship it, and some of the gypsum, however, would be shipped by them to our own Redwood City plant. I believe that on the gypsum that was shipped to our own Redwood City plant we took samples ourselves from the cars as they arrived at Redwood City. By far the greater part of the samples, ever since the contract began, were taken by Westvaco at Newark and furnished to us at our plant at Redwood City.

Q. That is, every time a car—

A. Every time they shipped a car they would take a sample, so the laboratory reports of the analysis of the gypsum for years and years were

(Testimony of C. Bruce Flick.)

always on the basis of one sample for each carload. The chemical analysis report gave the car number in fact and our charge-backs were car by car. I might say that there are between 50 and 55 tons of this gypsum in the typical freight car load.

The Court: Q. How many tons?

A. Between 50 and 55 tons.

Q. In a carload? A. In a carload. [179]

Mr. Bennett: Q. The defendant lately has asserted or claimed the right to submit samples on the basis of what, Mr. Flick?

A. Well, about a year ago, instead of furnishing samples, one sample for each freight car load, they began to furnish us with what they call a composite sample, representing about one week's production, or about 20 carloads, and they refused to furnish a sample each carload any more. They sent this composite sample, and they have continued that during the past year.

Q. Have you agreed, or have you objected to that?

A. We objected immediately when they began to furnish these composite samples. We asked them to continue to furnish a sample of each car as they had done for nearly ten years, or nine years, and they said, "No, we will give you a sample for each week's production, or about 20 cars, a composite sample."

Q. Do you consider that that new practice that they insisted upon, the changed practice, is adequate?

(Testimony of C. Bruce Flick.)

Mr. Rosenberg: I will object to that as incompetent, irrelevant, and immaterial; furthermore, if the Court please, there is nothing in the contract obligating anyone to furnish that.

Mr. Bennett: Q. What was the reason expressed to you by Mr. Wallace for that change in furnishing samples?

Mr. Rosenberg: When, Mr. Bennett?

Mr. Bennett: Well, whenever this matter was discussed, [180] whenever any reason was given.

The Witness: Mr. Wallace, and Dr. Seaton, and our Mr. Bannard and I had a conversation at Westvaco's Newark plant in the latter part of 1946, after Mr. Bannard had looked over their figures. I believe that was in October of 1946. Mr. Wallace said that they were discontinuing the car-by-car samples, because it was too costly, and another reason he stated to me was it would do away with a lot of these charge-backs, because you would have obviously an averaging out of good and bad in a 20-car sample.

Q. That was the only reason expressed for the change?

A. Those were the only two reasons I ever learned. Later on, after the suit was filed, when I questioned the matter of samples and again asked for a car-by-car sample, they replied by letter asking the same question that Mr. Rosenberg has indicated. They said, "Please tell us under what provision of the contract we are obliged to furnish you samples?" I do not believe I answered that letter.

(Testimony of C. Bruce Flick.)

Q. Let us get back to the big business at hand, Mr. Flick. I wanted to show on this matter of sampling you are entitled to some adequate basis, but I won't take this time of the Court to go into that. We can argue that at a later juncture.

To get back to the price protection clause and the cost of manufacture of gypsum and the actual advance, if any, in the cost of production and manufacture of gypsum, when, if you [181] know, Mr. Flick, was the first decontrol of gypsum by OPA?

A. The first decontrol of gypsum by OPA was on September 4, 1946. OPA decontrolled gypsum when used as a cement retarder on September 4, 1946.

Q. A large part of this gypsum that you had purchased through the years from the defendant being used as a cement retarder?

A. Yes, a very substantial portion of it. It varied a little from time to time, sometimes more, sometimes less, but cement retarder was a very substantial use for this Westvaco gypsum.

Q. And that fact was known to the defendant?

A. Oh, yes.

The Court: Q. I do not follow that entirely. What do you mean by "retarder"?

A. May I explain that in the manufacture of Portland Cement the last thing you do, after you have made the Portland cement clinker out of the ground-up limestone, you have a little clinker, and in the final step of the finish grind you add in gyp-

(Testimony of C. Bruce Flick.)

sum; between 2 and 3 percent of Portland cement is gypsum that is mixed in by a physical process of grinding in the last stage.

Q. Keeping in mind the date of September 4th, when OPA first decontrolled gypsum as a cement retarder, when is the next time that you had any communication or conversation with the defendant or any of his representatives with reference to the price that you were to pay for the gypsum, or this controversy [182] over the so-called escalator clause?

Mr. Rosenberg: Mr. Bennett, so that I can understand the question, when you are talking about the escalator clause—

Mr. Bennett: I am talking about paragraph 6 of the contract.

A. On August 31st, which was Saturday—after August 31st, which was Saturday, Westvaco discontinued shipping gypsum. September 1st was on Sunday. September 2nd was on Labor Day, as I recall it. Gypsum was decontrolled as a cement retarder on September 4th, and on September 5th Mr. Wallace told me that they had quit producing and shipping gypsum and would not produce and ship any more gypsum for an indefinite time in the future, until such time as Pacific acceded to their demands, and their demands were, No. 1, that we quit arguing about this price and pay them \$3.76 a ton, and they also wanted us to accept their claim against us for these specifications charge-backs for the past, and they wanted us to

(Testimony of C. Bruce Flick.)

agree that there would not be any more future charge-backs on account of gypsum percentage in any instance where we, ourselves, were able to resell the gypsum without having our customer make a charge-back against us, or in any case where we, ourselves, used the gypsum, and they also wanted us to agree that we would give up another point that was in dispute, as to whether we were obligated to take the entire amount of this production in a calendar year where they had told us, for example, "We are going to produce 40,000 tons under the contract. You have the right to refuse [183] more than 20,000 tons. At the same time, under the contract, we had the right to refuse more than 2000 tons in any one month." We maintain those two rights were separate and distinct. Westvaco said they were all part and parcel of the same thing. "If you say you are going to take 40,000 tons, you have to take it all in equal monthly installments." As I understand those were the points then at issue with them, and they said, "Unless you give us what we want on those points, we are just not going to make any more gypsum until further notice at an indefinite time in the future." They did not make any more gypsum.

The OPA decontrolled gypsum as a cement retarder on September 4th, and as far as OPA was concerned they were then free to increase the price of gypsum.

Mr. Bennett: Q. You were advised that they did stop the grinding and drying and delivering and making of gypsum?

(Testimony of C. Bruce Flick.)

A. Mr. Wallace told me that they had quit producing this gypsum. They said, "We are running slurry into the bay." And I remember the conversation quite clearly.

I said, "How can you run the slurry into the bay? It has your magnesium chloride in it."

He said, "Oh, of course, we filter it."

I said, "Well, what you are running into the bay, then, is gypsum."

"Oh, no," he said, "that is not gypsum."

But they continued then to run this by-product into the [184] bay. They no longer dried it, and ground it, and shipped it, but they ran the by-product into the bay until Mr. Wallace later informed me that they had resumed shipments on September 13th—

The Court: Q. What time elapsed, approximately?

A. Approximately two weeks when there was no production or shipment of gypsum.

The Court: Proceed.

Mr. Bennett: Q. Go ahead. Relate the next conversation or happening, Mr. Flick?

A. Well, on September 13th we agreed with them on a basis in which they would resume the drying and grinding and delivery of this gypsum, and we embodied that in a letter which we wrote to them to record our understanding of the basis on which they were to resume production and shipment.

The Court: Q. What date?

(Testimony of C. Bruce Flick.)

A. The letter is dated September 13, 1946. I was continuing in negotiation with Mr. Wallace for several days before I found out that they had already started to resume on September 13th, and we wrote two letters on September 13th. The first was a longer letter and the second was a shorter letter. The second was intended to supersede the first, but Westvaco replied to those two letters by a letter which they wrote dated September 23rd, and also by a letter of September 13th, 1946, they served notice that the price would again go up, effective [185] 60 days from then, because, they stated, there had been another increase in the cost of production, and that the price would go up effective, I believe, November 13th, from \$3.76 to, I believe the original price claimed was \$4.62. It has been reduced since by some corrections they have made, so at present it is \$4.36.

Q. That is the total amount that they are presently claiming, including this third claimed price increase?

A. Yes, the amount that they now claim after making some corrections which they made is now \$4.36.

Q. But originally the demand was—

A. \$4.62, I believe.

Mr. Bennett: I offer this letter from Westvaco Chlorine Products Company, the defendant, dated September 13, 1946, to the plaintiff, Pacific Portland Cement Company, and purporting to be signed by W. K. Wallace, Western Manager.

(Testimony of C. Bruce Flick.)

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 10.)

Mr. Bennett: I read the letter to your Honor:

“Referring to that certain agreement dated January 29, 1937, wherein Pacific Portland Cement Company, a California corporation, is party of the first part, and Westvaco Chlorine Products Corporation, a Delaware corporation, is party of the second part, and which said agreement covers the sale of gypsum to Pacific Portland Cement Company, you are [186] hereby advised that the average cost of the production of gypsum by the undersigned, Westvaco Chlorine Products Corporation, for the twelve-month period commencing July 1, 1945, to June 30, 1946, was more than five per cent above its average cost of production for the preceding twelve-month period commencing on July 1, 1944, and ending on June 30, 1945. The actual advance in the cost of production of gypsum to Westvaco for the twelve-month period commencing July 1, 1945, and ending June 30, 1946, over the previous twelve-month period was eighty-six (86 cents) cents per ton.

Pursuant to the terms of Paragraph 6 of the agreement hereinabove referred to, you are hereby given sixty (60) days notice, in writing, that on the 13th day of November, 1946, the price to be charged you and the amount to be paid by you for

(Testimony of C. Bruce Flick.)

all gypsum delivered to you by the undersigned, pursuant to the terms of the said agreement hereinabove referred to will be at the rate of Four and 62/100 Dollars (\$4.62) per ton, payment to be made in the manner set out in said agreement.

You are further advised that said increase in price will be applicable only to the gypsum shipped to you and resold by you as a retardant in cement, and that the advance in price with respect to gypsum not resold by you as a retardant in cement will be suspended until price control [187] on such gypsum is terminated by the Office of Price Administration.

You are further advised that the books of account and records of the undersigned relating to its production cost of gypsum will be open to your inspection at all reasonable times.

Yours very truly,

Westvaco Chlorine Products
Corp.,
/s/ W. K. Wallace,
Western Manager."

Mr. Bennett: Your Honor, it is a little after four o'clock. Does your Honor wish to keep going?

The Court: We will adjourn until tomorrow morning at ten a.m.

(An adjournment was thereupon taken until tomorrow, Thursday, December 11, 1947, at ten o'clock a.m.) [188]

Thursday, December 11, 1947, 10:00 o'clock a.m.

C. BRUCE FLICK,

recalled:

Direct Examination—(Resumed)

Mr. Bennett: Q. Yesterday you testified, Mr. Flick, on the 13th of September, 1946, after a conference with Mr. Wallace, and I believe at his suggestion, although my memory is not clear there, you sent to him two letters, one superseding the other?

A. Yes, I sent first a longer letter dated September 13th, and after discussion, after Mr. Wallace received it, that was revised to the shorter letter dated September 13th.

Q. Why was it revised?

A. Because Mr. Wallace did not agree entirely with the first of the two letters.

Mr. Bennett: I think without identification counsel will stipulate that this copy of a letter that I now offer in evidence is the first, and the longer of the two letters, is that agreeable?

Mr. Rosenberg: So stipulated.

The Court: It may be admitted and marked.

(The letter referred to was thereupon received in evidence and marked Plaintiff's Exhibit 11.)

(Testimony of C. Bruce Flick.)

PLAINTIFF'S EXHIBIT No. 11

Pacific Portland Cement Company
417 Montgomery St., San Francisco 6, California

September 13, 1946

Westvaco Chlorine Products Corporation,
Newark, California.

Attention: Mr. W. K. Wallace, Western Manager.

Gentlemen:

This letter is to record our understanding and agreement as follows:

(1) Sacking Gypsum

By letter dated June 23, 1945, from you to this company, accepted by us under date of June 30, 1945, the agreement between us for the sacking of gypsum by you for us was extended until July 31, 1946. By oral agreement between your Mr. W. K. Wallace and our Mr. C. B. Flick, this agreement for sacking was further extended to August 31, 1946. You informed us that you discontinued production of gypsum on August 31, 1946, and that you have no interest in sacking small quantities. It is agreed that said agreement for sacking expired on August 31, 1946.

(2) Price of Gypsum

By letter dated July 25, 1945, from this company to you, and accepted by you, it was agreed between us that the price at which you would sell and we would buy gypsum until July 31, 1946, under our

(Testimony of C. Bruce Flick.)

contract of January 29, 1937, would be \$2.98 per ton and that the so-called escalator clause of said contract which contemplates change in the price from time to time should not be operative at any time before July 31, 1946. By oral agreement between your Mr. W. K. Wallace and our Mr. C. B. Flick, this agreement of July 25, 1945, was further extended to September 4, 1946.

It is now agreed that effective September 4, 1946, the price at which you will sell and we shall buy gypsum until August 31, 1947, under our contract of January 29, 1937, shall be \$3.76 per ton for gypsum for cement retarder and \$2.98 per ton for gypsum for all other purposes and uses, and it is our intention to sell or use most of the gypsum received from you for cement retarder.

It is agreed, however, that at any time prior to August 31, 1947, whenever governmental laws or regulations permit a higher price than \$2.98 per ton for gypsum for purposes and uses other than cement retarder, you shall be entitled to charge such higher price, but not in excess of \$3.76 per ton.

(3) Deductions for Gypsum below specification

It is agreed that you have no claim against us for any deductions heretofore made in making payments to you for gypsum not within two per cent (2%) in gypsum content of, or not conforming to, the chemical analysis and specification which is a part of said contract of January 29, 1937.

(Testimony of C. Bruce Flick.)

(4) Right to refuse in excess of 2,000 tons in any month.

According to paragraph (3) of said contract, we have asserted the right to refuse to purchase and accept in excess of twenty thousand (20,000) tons in any one calendar year, and in addition the right to refuse to purchase and accept in excess of two thousand (2,000) tons in any one month. Without waiving any of our rights under the agreement, we are willing to say to you that for any calendar year as to which we do not exercise our right to refuse to purchase and accept in excess of twenty thousand (20,000) tons, it is our intention and we fully expect to purchase your entire production for that year if offered to us in approximately equal monthly installments.

Please sign and return this letter to us to evidence our agreement, retaining the duplicate for your files.

Very truly yours,

PACIFIC PORTLAND CEMENT
COMPANY,

By C. B. Flick, Vice-President.

Accepted and confirmed September . . , 1946.

WESTVACO CHLORINE PRODUCTS
CORPORATION,

By W. K. Wallace, Western Manager.

Mr. Bennett: And the second letter, or the shorter letter that followed it, the revised letter, will be Exhibit 12.

(Testimony of C. Bruce Flick.)

(The letter referred to was thereupon received in evidence and marked Plaintiff's Exhibit 12.) [189]

(1) Sacking Gypsum

By letter dated June 23, 1945, from you to this company, accepted by us under date of June 30, 1945, the agreement between us for the sacking of gypsum by you for us was extended until July 31, 1946. By oral agreement between your Mr. W. K. Wallace and our Mr. C. B. Flick, this agreement for sacking was further extended to August 31, 1946. You informed us that you discontinued production of gypsum on August 31, 1946, and that you have no interest in sacking small quantities. It is agreed that said agreement for sacking expired on August 31, 1946.

(2) Price of Gypsum

By letter dated July 25, 1945, from this company to you, and accepted by you, it was agreed between us that the price at which you would sell and we would buy gypsum until July 31, 1946, under our contract of January 29, 1937, would be \$2.98 per ton and that the so-called escalator clause of said contract which contemplates change in the price from time to time should not be operative at any time before July 31, 1946. By oral agreement between your Mr. W. K. Wallace and our Mr. C. B. Flick, this agreement of July 25, 1945, was further extended to September 4, 1946.

(Testimony of C. Bruce Flick.)

[Printer's Note]: The balance of Plaintiff's Exhibit No. 12, read into evidence at bottom of this page.

Mr. Bennett: I won't take time, your Honor, to read all the letters. They refer to another matter, but I will read the second letter, or Exhibit 12.

The Court: That is the revised letter?

Mr. Bennett: The revised letter.

Mr. Rosenberg: Sent on the same day.

Mr. Bennett: The same date, yes.

Mr. Rosenberg: The same day?

Mr. Bennett: Yes. Well, they are dated the same day, counsel. I do not know that they were actually sent on the same day. We can determine that from the witness, perhaps.

The Court: I think if you will read back the testimony already given, you will see that that has been asked and answered.

(Record read.)

Mr. Bennett: I will read three paragraphs, if your Honor please, beginning with the paragraph at the bottom of page 1 of Exhibit 12.

The Court: That is the revised letter?

Mr. Bennett: Yes, your Honor.

"It is now agreed that effective September 4, 1946, the price at which you will sell and we shall buy gypsum until November 13, 1946, under our contract of January 29, 1937, shall be \$3.76 per ton for gypsum for cement retarder and \$2.98 per ton for gypsum for all other purposes and uses,

(Testimony of C. Bruce Flick.)

and it is our intention to sell or use [190] most of the gypsum received from you for cement retarder.

It is agreed, however, that at any time prior to November 13, 1946, whenever governmental laws or regulations permit a higher price than \$2.98 per ton for gypsum for purposes and uses other than cement retarder, you shall be entitled to charge such higher price, but not in excess of \$3.76 per ton.

We reserve the right to question the use of this price of \$3.76 per ton as a base for any upward adjustment of the price in the future under the escalator clause. Our reasons for this lie in the questions which exist between us with respect to certain cost items claimed by you which have been discussed between us in the past and which we consider unsettled.

Please sign and return this letter to us to evidence our agreement, retaining the duplicate for your files."

Mr. Rosenberg: Mr. Bennett, isn't that from the longer of the two letters?

Mr. Bennett: No, this is the shorter.

The Court: This is the revised letter.

Mr. Bennett: Q. I will ask you, Mr. Flick, whether you ever received the acceptance of the proposals contained in this letter, namely, Plaintiff's Exhibit 12, by receipt of a copy of the letter with a form of acceptance executed by the defendant, or anyone representing the defendant? [191]

A. No, sir, I did not receive their acceptance of it. I received a letter denying it.

(Testimony of C. Bruce Flick.)

Q. You mean refusing to accept it?

A. Refusing it.

Q. When was it that you were first advised, and in what form, that the defendant would not accept the conditions or accept the proposals contained in your letter of September 13, 1946?

A. I was first advised that they would not accept it by a letter from Westvaco dated September 23, 1946.

Q. You have already testified that you had received in this period of time a third claimed price increase by the defendant. What was the date which you received the notice of that third price increase, Mr. Flick?

A. They gave us notice of the third price increase, as I recall it, by a letter dated September 13th, stating that in conformity with the 60-day notice provision in the contract the price would be increased effective November 13, 1946.

Mr. Bennett: That notice is contained, your Honor, in Plaintiff's Exhibit No. 10, which is already in evidence, introduced yesterday, and the new price claimed by the defendant was \$4.62 a ton at that time?

The Witness: Yes.

Mr. Bennett: Q. Since that time, Mr. Flick, they have reduced that claim by two further reductions, that is, they notified you that through error they included certain items that [192] they since have felt were not properly included?

A. Yes, they made corrections in their cost figures. There was one correction of 14 cents, and

(Testimony of C. Bruce Flick.)

there was another correction of 12 cents. The 12-cent correction was on the sulphuric acid charge, so that they made corrections aggregating 26 cents, which made the corrected price as claimed by them \$4.36.

Q. The last correction was made by them after this suit was filed? A. Correct.

Q. What, if anything, did you do with reference to any investigation of the basis for this additional or last-claimed increase, the third increase, which amounted to how many cents per ton claimed initially?

A. From \$3.76 to \$4.62 claimed initially.

Q. In other words, a third increase with 86 cents per ton claimed increase? A. Correct.

Q. Keeping in mind now, so your Honor will have the facts, the first increase in 1941 was a claimed increase of 18 cents. The second increase claimed in 1944 was what, Mr. Flick?

A. 78 cents.

Q. Additional to the 18 cents previously claimed, and the third claimed increase was how much? A. Originally 86 cents.

The Court: Q. And there was a reduction of 26? [193] A. 60 cents.

Mr. Bennett: Q. In other words, the three claim price increases total \$1.56, is that correct?

A. That is correct.

Q. And again, so that the record will be clear, the company paid without question this 18-cent increase at all times? A. Correct.

(Testimony of C. Bruce Flick.)

Q. At all times it offered to pay the 29 cents which was involved in the second price increase claimed of 78 cents, and which involved the total amount of the actual charges or costs which they claim, according to their books, were increased in the amount of 29 cents; in other words, you had up the time of the third increase agreed to pay an increase over the contract price of \$2.80 a ton, an additional 47 cents? A. Correct.

Q. Now, when this last claim, the third claim for a price increase on September 13, 1946, an additional 86 cents, was made, what, if anything, did you do to check into those claimed increased costs?

A. I sent Mr. L. O. Bannard, who was in the employ of Pacific Portland Cement Company, as our own auditor. I sent Mr. Bannard to Westvaco's office at Newark to look at their figures?

Q. And he, in turn, reported to you?

A. Mr. Bannard reported to me. After he examined the figures they gave him he came back and reported to me. Then Mr. [194] Bannard and I went down to Newark and had a discussion with Mr. Wallace and Dr. Seaton, who was out at that time, and we went over the figures, and the same questions that were discussed heretofore. Westvaco again maintained their position of their right to keep these accounts in accordance with their uniform accounting system, the right to treat them as joint products, or co-products, disregarding the fact that they were by-products.

(Testimony of C. Bruce Flick.)

Q. Is that what Mr. Wallace or Mr. Seaton said?

A. Mr. Wallace and Dr. Seaton have always maintained that position, that regardless of the fact that the product may be a by-product, under their uniform accounting system they treat it as if it is a joint product or a co-product. So we did not get very far in our discussion of the figures. We maintained the same position that we had heretofore. Dr. Seaton, however, did say that he would go into some of the questions raised, and it was as a result of that that the first correction of 14 cents was made, as we have already covered here. Then after the discussions which got nowhere, I wrote a letter on November 4th setting forth the differences between us, the items that we were willing to pay and the items that we questioned, and again offering to settle the differences by any reasonable means or any reasonable method.

Mr. Bennett: I think you have the letter of November 4th before you, Mr. Rosenberg?

Mr. Rosenberg: Yes. [195]

Mr. Bennett: I offer in evidence as Plaintiff's Exhibit 13, your Honor, the letter from Mr. Flick, of Pacific Portland Cement Company, dated November 4, 1946, to Westvaco Chlorine Products Corporation.

The Court: Admitted and marked.

(The document was marked Plaintiff's Exhibit 13 in evidence.)

(Testimony of C. Bruce Flick.)

Mr. Rosenberg: May I see it just a moment?

Mr. Bennett: Do you want a copy of it?

Mr. Rosenberg: I think I have a copy.

Mr. Bennett: I will give you a copy.

Mr. Rosenberg: I just want to see, there was a typographical error in copying, and I want to see whether the same error is in there.

Mr. Bennett: Do you wish me to wait before reading this?

Mr. Rosenberg: No, that's all right.

Mr. Bennett: This letter, I think is important, your Honor. In reviewing and analyzing the situation it will be of aid to the Court, and I will read it in full:

“Pacific Portland Cement Company

417 Montgomery Street

San Francisco 6, California

November 4, 1946

“Westvaco Chlorine Products Corporation
Newark, California.

Attention: Mr. W. K. Wallace, Western
Manager

Gentlemen:

Subject: Westvaco Gypsum Contract [196]

“Your letter of September 13, 1946, referring to the agreement of January 29, 1937, between us, advised that

“The actual advance in the cost of production of gypsum to Westvaco for the twelve-month pe-

(Testimony of C. Bruce Flick.)

riod commencing July 1, 1945, and ending June 30, 1946, over the previous twelve-month period was eight-six (86c) cents per ton" and notified us that "on the 13th day of November, 1946, the price to be charged . . . for all gypsum delivered . . . pursuant to the terms of the said agreement hereinabove referred to will be at the rate of Four and 62/100 Dollars (\$4.62) per ton . . . applicable only to the gypsum shipped . . . and resold . . . as a retardant in cement."

Subsequently our Mr. L. O. Bannard has visited your Newark, California, office to inspect your books of account and records relating to the production cost of gypsum and has been furnished some information by your Mr. Wallace and Mr. Watt, but not all that he requested. We are unable to confirm correctness of the price advance of 86 cents per ton and question that much advance is correct. Items questioned by our auditor are as follows:

Operating Materials

Westvaco shows increase of \$.03 per ton, Pacific will [197] "accept increase of \$.02 per ton, questions \$.01 per ton, as it appears to have resulted from a change in accounting method for charges for low pressure air compressor, rather than an actual increase in cost of production.

Sulphuric Acid

Westvaco shows no charge in past periods, now charges \$.35 per ton. Pacific questions this as it does not appear that actual cost of production of

(Testimony of C. Bruce Flick.)

by-product gypsum has increased, but merely a change in bookkeeping methods has been made, and furthermore the adding of sulphuric acid in the manufacturing process benefits products other than gypsum.

Bittern

Westvaco shows increase of \$.06 per ton, Pacific questions this as it appears to be due to a purely arbitrary bookkeeping increase rather than an actual increase in cost of production of gypsum, and Westvaco refused to show our auditor the computations.

Direct Charges

Summarizing the charges classed by Westvaco as 'direct', Westvaco shows total increase of \$.62 per ton, Pacific will accept \$.20 per ton, and questions \$.42 per ton with respect to Operating Materials, Sulphuric Acid, and Bittern, as shown above.

Pacific furthermore questions the correctness of [198] Westvaco's accounting methods for by-product gypsum which allocates to the by-product, costs incurred prior to the point of separation of the by-product.

Research

Westvaco shows an increase of \$.10 per ton for Research. Pacific questions this charge as it does not appear that Westvaco's research activities are actually a cost of producing by-product gypsum.

Indirect Loading and Shipping Expense

Westvaco shows an increase of \$.02 per ton which Pacific questions as it appears to be due

(Testimony of C. Bruce Flick.)

to a change of bookkeeping methods and not an actual increase in cost of production of gypsum.

Overhead

Westvaco shows net increases aggregating \$.07 per ton, in sundry items comprising general overhead. Pacific questions the correctness of including certain of the items comprising this group, and also questions the correctness of the basis of prorating overhead as between by-product gypsum and other products produced.

Direct Loading and Shipping Expense

Westvaco shows an increase of \$.05 per ton which Pacific will accept.

Total Charges

Summarizing all of the foregoing, Westvaco shows an [199] increase of \$.86 per ton in cost of production of by-product gypsum, of which Pacific is willing to accept \$.25 and questions \$.61 per ton.

Furthermore, we question the use of the preceding price of \$3.76 per ton as a base for any upward adjustment of the price under the escalator clause. In our letter to you dated February 4, 1944, we stated that

“ ‘we question the correctness of the proposed price of \$3.76 per ton’

and in our letter of February 28, 1944, we stated that

“ ‘we question that the facts entitle you to the entire amount for which you have asked.’

(Testimony of C. Bruce Flick.)

In our letter of March 11, 1944, we stated

“‘When Dr. Seaton is here in April we shall negotiate the question of interpreting the term “Cost of Production” so that any and all questions shall be determined as a basis for adjusting prices in future in accordance with the contract, and to determine whether any price less than \$3.76 should be charged during 1944.’

Dr. Max Y. Seaton, Executive Vice-President, wrote to us on March 13, 1944:

“‘I will be very glad to discuss with you the development of more precise understandings regarding the meaning of the term “Cost of Production” which is included in our contract with you.’ [200]

“Such discussion took place on April 14, 1944, between Dr. M. Y. Seaton, Executive Vice-President, Mr. W. K. Wallace, Western Manager, and Mr. C. B. Flick. Mr. Flick expressed this company’s position that cost accounting methods satisfactory to Westvaco for its own purposes may result in incorrect charges to cost of production of by-product gypsum under the contract, especially in respect to allocating overhead. Dr. Seaton did not admit that any change in accounting methods should be made, and all questions discussed were left open and unsettled.

“The contract dated January 29, 1937, between Pacific Portland Cement Company and California Chemical Company—”

(Testimony of C. Bruce Flick.)

The contract in question—
recites:

“ ‘Whereas California contemplates the erection of a plant located on Canal Head at Newark, California, primarily designed to produce magnesium oxide in its various forms, which plant will produce as a by-product substantial quantities of gypsum’ ”

and provides in paragraph (1)

“ ‘California agrees that it will sell and deliver to Pacific and Pacific agrees that it will purchase and receive from California, the entire output of by-product gypsum . . . (subject to the other provisions therein) [201]

“ ‘Paragraph (6) of the contract contains the ‘escalator’ clause under which the price may be increased in relationship to ‘California’s cost of production of gypsum’, ‘in an amount not to exceed the actual advance in California’s cost of manufacture.’ ”

Mr. Rosenberg: May I interrupt? I presume this letter is offered for the purpose of showing that Mr. Flick made objections to the price of \$3.75.

Mr. Bennett: Not only that—

Mr. Rosenberg: I am going to object to all of these self-serving and argumentative statements. I have no objection to the letter going in evidence to show the objections Mr. Flick made to our derivation of our increase in cost of production, but I

(Testimony of C. Bruce Flick.)

don't understand that it is going into the record as substantive evidence of the argumentative matter contained in the letter, or the accountant's arguments—

The Court: Just a moment. This is correspondence between the parties.

Mr. Rosenberg: That's right.

The Court: For what purpose is it offered?

Mr. Bennett: The purpose of the offer, your Honor, is to show the statements that were made by these parties, one to the other, during the course of time. One of the defenses they claim here is estoppel.

The Court: His objection goes to the language there used [202] as argumentative and what-not.

Mr. Bennett: I know, but, your Honor, that might be said of anything or everything we have done so far, that it is an argument. That is the essence of this case. We have to establish the controversy exists, the basis for the controversy, what was said by the parties with respect to that controversy, all that has to do with the matter that this court is going to construe. The court has received this sort of matter all along. There is another thing, interruptions in the midst of reading a letter of this kind that has been admitted without objection is extremely embarrassing to us, and I think it tends to deflect the court's attention from the subject-matter that is. It is relevant, and I assure your Honor I wouldn't be reading these things—I don't ask your Honor to accept my statement *ipsi dixit*

(Testimony of C. Bruce Flick.)

for it, but if there was not a definite purpose, a pre-thought-out purpose within proper limits of judicial procedure, a purpose that I am endeavoring to show—

The Court: Well, I can clear this up in just a moment. You have made an objection to it before. I overruled your objection, and it is subject to a motion to strike and over your objection.

Mr. Rosenberg: I don't think this is within the same category. My objection was to a letter antedating the execution of the contract. This is a letter written by Mr. Flick sometime, almost nine years after the contract. I assumed that it was [203] being offered for the purpose of showing the items to which Mr. Flick objected, and the basis of his objections. I have no objection to that. There is a lot of argumentative matter in here that I want to avoid.

The Court: Well, the jury is absent.

Mr. Rosenberg: That's right. I do not want it to be taken as evidence of the substantive facts.

The Court: Well, I may or may not take it. I told you the jury is not here.

Mr. Bennett: Counsel can argue this case, I think, at the appropriate time. It is not fair to interrupt. If he had objection to it he should have—

The Court: Go ahead with the reading of the letter.

Mr. Bennett: To bring your Honor back, Mr. Flick had been outlining certain provisions of the contract, and he had referred to the preliminary

(Testimony of C. Bruce Flick.)

provision stating that it was a by-product, and that California agreed to sell subject to the terms and conditions of the contract at a certain price the by-product. Then Mr. Flick's letter continues—this is an answer, as your Honor knows, to this claimed price increase:

“Paragraphs (6) of the contract contains the ‘escalator’ clause under which the price may be increased in relationship to ‘California’s cost of production of gypsum’, ‘in an amount not to exceed the actual advance in California’s cost in California’s cost of manufacture.’ [204]

“The contract does not contain any definition of the term ‘cost of production’ or ‘cost of manufacture.’ Since the contract deals with by-product gypsum it is apparent that the term ‘cost of production’ must be construed as ‘cost of production of by-product gypsum’ and the method of computing such cost should be the method which would be applicable as proper accounting practice for computing cost production of a by-product.

“In a letter dated June 5, 1936, Stanley H. Barrows, President of California Chemical Company, stated,

“‘Contract would contain certain price protection clauses to guard against increases in labor, fuel and supplies.’

“The first price increase claimed under the contract was an increase of 18c per ton, effective October 5, 1941, raising the price from \$2.80 to \$2.98 per ton loaded bulk on board cars at the Newark

(Testimony of C. Bruce Flick.)

plant. This was based on an increase in costs from \$1.66 per ton for July 1939—June 1940, to \$1.84 per ton for July 1940 to June 1941. Of the total increase of 18c per ton, labor, material and power accounted for 15c. Westvaco furnished month by month detail thereof. Since these direct charges accounted for such a large percentage of the total, Pacific accepted without question or detail the remaining net increase of 3c per ton merely because it was too small to warrant close [205] investigation.

“The figures furnished by you for the calendar year 1943 compared with the calendar year 1942 showed that direct costs charged to cost of production of gypsum increase \$.29 per ton, as follows:

	Per Ton		
	1942	1943	Increase
Labor operations.....	\$.26	\$.39	\$.13
Labor repairs.....	.12	.16	.04
Comp. Ins. and Soc. Sec. Taxes.....	.02	.03	.01
Material, operations.....	...	.02	.02
Material repairs.....	.06	.07	.01
Power .....	.15	.18	.03
Fuel .....	.10	.14	.04
Water .....	...	.01	.01
Total increase.....			\$.29

“We are willing to accept this increase in direct cost of production of gypsum as the basis for increasing the price from \$2.98 to \$3.27. As previously stated, however, we question the following increases as we do not believe that they represent

(Testimony of C. Bruce Flick.)

an actual advance in your cost of manufacture of by-product gypsum. [206]

	Per Ton		
	1942	1943	Increase
Overhead	\$42	\$.82	\$.40
Taxes, Ins. & Deprec.....	.41	.49	.08
I. D. C.—water.....	.....	.01	.01
Total	\$.83	\$1.32	\$.49

“Loading and Shipping Expense was shown by you at \$.19 per ton in both years, so no increase was claimed on that account.

“We are ready, willing and anxious to pay you the amount that you are entitled to receive under the contract. You have notified us that the price will be \$4.62 per ton effective November 13, 1946. We are willing to pay \$3.52 per ton instead. It may very well be that you are entitled to the additional \$1.10 per ton, but in the absence of information which our auditor requested from you and which we consider necessary to determine the amount of increase in your cost of production, and pending further discussions with you as to the correct accounting methods to be followed in computing your cost of production of by-product gypsum we are unwilling to pay you any more than \$3.52 per ton.

“We shall be glad to discuss this with you at any time, and as stated in our letter of February 28, 1944, hereby renew our offer to take all reasonable steps to have any questions which might exist

(Testimony of C. Bruce Flick.)

between us determined by any reasonable method or in any reasonable manner. [207]

“Very truly yours,

Pacific Portland Cement
Company

By C. B. Flick

Vice-President.”

The Court: We will take a recess.

(Recess.)

Q. (Mr. Bennett): Mr. Flick, referring again to your letter of November 4, 1946, which I have just read to His Honor, you mentioned the fact at the bottom of page 1 of that letter some information was furnished by Mr. Wallace and Mr. Watt, but not all that he requested Mr. Bannard. What was the information that you referred to as being requested but was not furnished?

Mr. Rosenberg: To which we will object on the ground it appears from the letter it was information requested by the auditor. If Mr. Flick made any request, or if he was present at the time the request was made, I would have no objection.

Q. (Mr. Bennett): Mr. Flick, I think you testified after Bannard had gone down there to seek information that both you and Bannard went back to the Newark plant and had a discussion with Mr. Wallace and perhaps others there, is that correct?

A. Yes. We had a conversation with Mr. Wallace and Dr. Seaton was present. He happened to be out here from the East at that time.

(Testimony of C. Bruce Flick.)

Q. Was anything said at that discussion by you or by Mr. Wallace or Dr. Seaton representing the defendant Westvaco with reference to any record or information that they had not furnished or would not furnish?

A. Yes, we discussed the question of information which they did not wish to furnish, declined to furnish. They had allocated— [208]

Q. Just pause there. I will next ask the question of you, What was the information that they had not furnished and refused to furnish?

A. The information which they refused to furnish was information having to do with the costs, tonnages, payrolls, in general any information of the plant or other departments or other products of the plant other than the byproduct gypsum. I might say the reason why we wanted a look at such information was because of allocations or prorates charged to gypsum, which naturally the auditor, Mr. Bannard, was unable to verify without seeing the figures which made up the allocation computation.

Q. Now, so that that matter is perfectly clear, do you mean an item—

Mr. Rosenberg: Let him tell us.

Q. (Mr. Bennett): All right. Unaided by counsel, will you illustrate what you mean by that?

A. For example, if an item is charged, let us say, 5 per cent to gypsum—

Q. 5 per cent of what? Do you mean overhead?

A. 5 per cent of an item. Let us take overhead.

(Testimony of C. Bruce Flick.)

Suppose you have overhead, of which 5 per cent is charged to gypsum on the theory that the payroll in the gypsum department is 5 per cent of the total plant payroll. Therefore the overhead should be allocated 5 per cent to gypsum.

Q. Just pause there. Do you mean that is your statement of [209] what should be done or their statement?

A. No, indeed. I am illustrating the kind of accounting practice Westvaco follows.

Q. You are speaking of what they claim was their procedure that they followed.

A. Yes, and I am using percentages here that are close to the actual, but I do not recall the precise percentages. I am trying to make a simple illustration. They allocate certain overhead items on the basis of a percentage of labor payroll. If the gypsum department labor payroll is 5 per cent of the labor payroll for the entire plant, then they will charge as cost of production of gypsum, 5 per cent of these overhead items which they elect to allocate on that basis, do you see?

Q. Yes.

A. An auditor who attempts to verify the correctness of the amount charged to the gypsum department, in order to tell whether the labor payroll for the gypsum department is in fact 5 per cent of the labor payroll for the entire plant, must look at the payroll for the entire plant. In order to tell whether the amount of overhead is allocated correctly, he must look at the total amount of the overhead. Or take another example: If you have a

(Testimony of C. Bruce Flick.)

shipping expense, which in past years they allocated on a tonnage basis, in order to tell whether the tonnage allocation was properly done, the auditor has to know not only the tonnage of gypsum shipped, but the tonnage of magnesium [210] oxide shipped, and if they refuse to show how many tons of magnesium oxide were shipped, he can't check the correctness of the percentage or the allocation.

Q. Does that same thing apply to whether any items that are claimed allocable to gypsum are properly allocable? For instance, if some item of charge, indirect or overhead, is allocated or claimed to be allocated to gypsum, does that necessity of checking the other records apply as in the illustration or instance you have made?

A. I have been talking only about checking an allocation without reference to the question of whether the item allocated on their books should be allocated on their books under good accounting or under the contract, but I am simply illustrating in order to check any allocations of whatever nature, an auditor has to see the whole picture in order to check percentage and check the amount allocated.

Q. That applies not only to checking the correctness of the amount but to determining whether the item allocated has any relation to the manufacture of gypsum, isn't that so?

A. In order to determine whether the amount allocated has any relation to the manufacture of gypsum, he has to know the nature of the thing that was allocated. Let me illustrate that by

(Testimony of C. Bruce Flick.)

perhaps bittern. That would be an example. They charged a certain amount to gypsum for bittern, admittedly on a purely arbitrary basis. The auditor was not given any information [211] as to the cost of the bittern or how much bittern was charged to other products or why the certain amount was charged to gypsum on account of bittern. Those are all questions of the amount charged for bittern. That is aside from the further question whether any bittern should be charged to gypsum.

Mr. Bennett: If Your Honor please, at this juncture and so that the Court will be able better to follow the significance of these points that have been discussed in the witness' testimony, I wish to read into the record a question in our interrogatories to the defendant and the defendant's answer to that interrogatory. I would like to interrupt the witness because it is a foundation matter upon which further questions will be asked. Mr. Kaapcke will read it.

Mr. Kaapcke: As an explanatory matter, I might say I will read one question and one answer. A similar question was asked for each accounting period and the same answer was given with respect to each accounting period, so we can cover the entire matter by repeating the one particular one.

The particular interrogatory I am reading is No. 4E:

“State in what particulars and to what extent each element of such cost contributed to or was related to the production of gypsum. State whether

(Testimony of C. Bruce Flick.)

each element would have been incurred if no gypsum had been produced.”

And the answer, being Answer 4E:

“None of the direct charges shown upon Exhibit A— [212] parenthetically there was an exhibit for each accounting period—none of the direct charges shown upon Exhibit A would have been incurred if no gypsum had been produced. Indirect charges shown on Exhibit A would have been incurred if no gypsum had been produced but in a lesser and unascertainable amount.”

To illustrate what the charges were referred to on the exhibit, the exhibit for each accounting period shows a statement of the defendant's classification of charges, and the one for Exhibit A that we are using as a typical example shows the following: “Labor operations, labor repairs, materials, operations, materials, repairs, power, gas, overhead and shipping expense.”

Mr. Bennett: Just so there is no question in the mind of the Court, I would like to summarize my understanding. I am not testifying now, but so that the Court will understand our purpose in offering this answer to the interrogatory, the defendant stated in answer to our question, “Which of the charges claimed by you would not have been incurred if you were not producing or manufacturing gypsum?” As Mr. Kaapcke read, the defendant answered that all of the direct charges, labor, materials, supplies, and so forth, listed on the exhibit appended to the answer to the interrogatories,

(Testimony of C. Bruce Flick.)

would not have occurred. They say that the other charges that were included in the category of overhead and indirect, and which they apportioned [213] by their bookkeeping method, the additional charge which they assert, which is the type of charge in dispute—they admit that even though gypsum was not manufactured, those charges would have gone on, but they say in a less but unascertainable amount. I think the significance of that will appear further by the witness' testimony and the testimony of other witnesses.

Q. As I understand it, then, in the absence of your right to see the books of the company, to verify the figures as to the accuracy of the arithmetic or allocation and also to determine whether any so-called indirect or overhead item is properly allocable to the cost of manufacture of gypsum, you would have to see those records, wouldn't you, or any accountant would have to see those records, isn't that your testimony?

A. Any accountant would have to see the complete records.

The Court: Let the Court inquire at this time of counsel. Were these books available to the defendants here at all times?

Mr. Rosenberg: I believe they were, Your Honor, with one exception: With reference to our records pertaining to our sales of products other than gypsum, which would naturally reveal how much we made, who we sold to, the price we got

(Testimony of C. Bruce Flick.)

for the product—those were not made available to them. I do not think that has any materiality.

The Court: Let me try to approach it in another way, then. How can you determine overhead costs unless the books are available? [214]

Mr. Rosenberg: The books were available to them for the purpose of determining our overhead costs. There is certainly no showing up to this point that the books were not available to them to show our overhead costs, with this possible exception, Your Honor: I believe the point Mr. Flick made is where we allocate overhead, by relating our direct gypsum cost to the total labor cost in the plant, naturally the total cost would be a factor in determining the propriety of that allocation. My understanding is Mr. Bannard, who is their accountant, when he went to the plant in 1946 for the purpose of checking the last price increase, did make a spot check of the total labor cost, and I believe also that this is a fact that they were told that we considered that those records which pertain to the production of other items, other than the gypsum, in which they were interested, were trade secrets. We did not like them going into the books and poring over those things that the corporation considers to be confidential information, but we would be willing to have an independent certified public accountant go in and certify to the correctness of the ultimate result.

Q. (The Court): Is that a fact?

(Testimony of C. Bruce Flick.)

A. I don't recall, at that time, the offer to have a certified public accountant check those things.

Mr. Bennett: I think that arose after the suit was filed and we made a motion to inspect the books. That was refused [215] before Your Honor. I would like to call Your Honor's attention to defendant's answer to plaintiff's interrogatory No. 11, wherein the defendant states that it would not permit any investigation or inquiry into the books showing cost to them of bittern so as to determine its allocation, if any allocation was proper, as against the cost of gypsum because that would disclose terms and conditions of a material contract between said supplier and defendant and inspection of such contract and the payments made thereunder would disclose all the products made by defendant, and the quantity sold. Disclosure thereof would require defendant also to reveal detailed information with reference to all products sold by defendant, including the identity and quantity of such products. Likewise, defendant has bittern contracts with other producers and the disclosure of the terms and conditions of its bittern contract with Leslie Salt Company might jeopardize the present and future relations of defendant with such other producers. Likewise defendant claims that its books, records and entries showing the bases for allocation of shipping expense likewise confidential and comprise trade secrets for the reason that disclosure of said information would reveal the products sold by defendant and the quantities and

(Testimony of C. Bruce Flick.)

selling price thereof. The general ledger which contains the entries above referred to are located in defendant's plant at Newark.

So there were other matters than bittern which the [216] defendant refused to disclose.

Mr. Rosenberg: Which answer was that?

Mr. Bennett: 11.

Mr. Rosenberg: You have not read the entire answer, have you, Mr. Bennett?

Mr. Bennett: What was that?

Mr. Rosenberg: I did not follow you very well. Were you skipping around?

Mr. Bennett: I paraphrased the question with relation to bittern and I read your reasons for excluding the defendants from looking at your expense records and the like. [217]

Q. (Mr. Bennett): Now, these payments that were made during this period of dispute pursuant to this letter of September 11, were they made under protest, Mr. Flick?

A. For the period from September 4, when the OPA decontrolled gypsum when used as a cement retarder, to the period November 13, 1946, we paid them \$3.76 a ton for the gypsum for use as cement retarder and for any other gypsum for any other use which was still subject to the OPA price control we paid them \$2.98 a ton and I don't believe that every check that we sent them was specifically protested, but we had certainly made our position clear both before and after that period. There was never any question.

(Testimony of C. Bruce Flick.)

The Court: Was that the money that had been paid into court?

Mr. Bennett: Both paid to the defendant under protest and also the monies paid into court.

The Court: Is there any question about that? If there isn't, you might enter into a stipulation concerning those facts.

Mr. Rosenberg: I was writing, Your Honor. What was that?

Mr. Bennett: The question is this: The payments that were made on any gypsum furnished on and after the 13th of September, 1946, to you were paid under protest.

Mr. Rosenberg: I don't believe that is true. I think the witness just said there was no protest accompanying all checks. [218]

The Court: From the period of the OPA.

The Witness: I said that the payment for gypsum delivered from September 4, when OPA price control went off, the gypsum as cement retarder from then until November 13, we paid \$3.76 a ton. Now, on payments, every check that went out from our accounting office may not have accompanied or been accompanied by a specific protest, but we had been making our position clear as to the \$3.76 price ever since January, 1944 and, as a matter of fact, to November 13, 1946.

Mr. Rosenberg: The payments that were made at the \$4.48 price, of course, were definitely made under protest. There is no question about that. As far as the money that is being paid into the court,

(Testimony of C. Bruce Flick.)

what they are doing is paying us the minimum amount that they concede that we are entitled to—

The Court: I wanted to have that established for the record. I thought it could be done without wasting any further time.

Mr. Bennett: I will offer in evidence, if Your Honor please, at this time and ask it be deemed read a letter dated December 11, 1946, a letter dated February 12, 1947, a letter dated January 10, 1947, and another letter dated December 17, 1946.

Mr. Rosenberg: May we see what you are offering in evidence?

Mr. Bennett: Yes. They are letters that were sent by us [219] for the plaintiff to the defendant.

Mr. Rosenberg: If you want to clutter up the record—I just stipulated referring to payments made at the \$4.48 price, they were paid under protest. Is that the purpose of those letters? I have no objection to them going in evidence.

Mr. Bennett: The letter of December 11 includes a protest for certain payments made on the \$3.76 price, on page 2, Mr. Rosenberg, and if we can either stipulate to that or introduce the letter in evidence, perhaps that would be the quickest way.

Mr. Rosenberg: What did you say they were paid—

Mr. Bennett: Payments that were made prior to the \$4.48 price.

Mr. Kaapeke: That was shipments through November 13. It was not until November 13 that your \$4.48 price became effective so that—

(Testimony of C. Bruce Flick.)

Mr. Rosenberg: Our price would be correct—well, I have no objection to the letter.

Mr. Bennett: Well, let's put the letter in as plaintiff's exhibit next in order.

(The letter in question was thereupon received in evidence and marked Plaintiff's Exhibit No. 14.)

Mr. Bennett: I will just read at this time the first paragraph. This is the letter dated December 11, 1946 addressed to Westvaco Chlorine Products Company signed by Pacific Portland Cement Company, C. B. Flick. [220]

“Gentlemen:

“Subject: Westvaco Gypsum Contract

“We hand you herewith our check No. 3957 for \$6748.29, as a payment on account of gypsum deliveries through November 12, 1946.”

Q. And that payment, Mr. Flick, was made on the basis of \$3.75 and according to and pursuant to the conditions of your letter of September 13, 1946, in evidence as Plaintiff's Exhibit 11, was it not?

A. Yes.

Q. “We also hand you herewith our check No. 3575 for \$5831.97, being payment on account of gypsum delivered November 13 to 30, 1946, both inclusive.”

That was the payment at the higher rate claimed and demanded by them?

A. Yes; the higher rate went into effect on No-

(Testimony of C. Bruce Flick.)

venember 13 and covered until the end of the month.

Q. "This payment, aggregating \$12,580.26, is being made to you with the understanding that it is without prejudice to the rights either of Westvaco or of Pacific Portland Cement Company and subject to adjustment when the correctness of the price has been finally determined. In this connection, we understand that our attorney, Mr. M. D. L. Fuller of Pillsbury, Madison & Sutro, has been and is discussing this matter and other open questions with your attorney, Mr. T. Bacigalupi of Bacigalupi, [221] Elkus & Salinger."

Now, Mr. Flick, I am going to ask you some questions about accounting practices based upon your training and experience as a certified public accountant and as an accountant and auditor aside from your general accounting practices, accountant and auditor for various and sundry businesses that you have had during the period shown by your previous testimony.

In a situation of this kind, involving a contract between a manufacturer and a purchaser where the contract provides for the sale of a byproduct and where the contract states a base price, a fixed price, subject, however, to an increase during any 12 month period as compared to the previous 12 month period of the costs of production of such byproduct whereby the seller is entitled to an increased price on the stated contract price where any actual increases or advances in the cost of manufacturing of a byproduct occurs, from an ac-

(Testimony of C. Bruce Flick.)

counting point of view and in accordance with good and acceptable accounting principles, what would be the character of the items of cost of manufacture that would be attributable to the byproduct, the cost of manufacture of the byproduct?

Mr. Rosenberg: Just a moment. I am going to object to that, particularly on the ground that is not a proper subject of expert testimony for the reason that there has been injected into the hypothetical question the condition that he is to render his opinion based upon this contract. [222]

Now, I submit that that is not a matter for an account to testify to, that is a matter for the Court to determine as a matter of law. If he wants to give any testimony—if Mr. Bennett is interested in any testimony from this witness as to the accounting principles applicable to and acceptable for determining cost of byproducts, or whatever he wants to call them, I have no objection to that, but when he asks the witness to tell this Court what this contract, what under this contract is to be included in cost of production, he is calling upon the witness to interpret the contract. That is the function of the Court, not the witness.

Mr. Bennett: Your Honor, I think the question is proper but to save time and avoid argument I will approach it from a different point of view. I do not, however, concede the soundness or validity of counsel's objection.

The Court: So there is no future difficulty about it, the accountant here could not possibly construe the contract requirements.

(Testimony of C. Bruce Flick.)

Mr. Bennett: I did not think the question called for a construction—

The Court: Well, I think it would be well to omit the language in relation to the contract.

Q. (Mr. Bennett): If the problem submitted to accountants is a matter of determining cost or setting up cost of manufacture or cost of production of a byproduct, what costs are to be [223] included according to accounting practice in such a situation?

Mr. Rosenberg: Just so we are clear on that point. What do you mean by “such a situation”? What do you mean by the reference in the question to “such a situation”?

Mr. Bennett: The situation I have just stated to the witness.

Mr. Rosenberg: You mean—let me understand the question—your question, as I understand it, you are asking him to tell you what according to good accounting practice are the items to be included in determining the cost of producing a byproduct?

Mr. Bennett: Yes.

Mr. Rosenberg: All right.

The Court: You may answer.

The Witness: Good accounting practice in accounting for the cost of production or cost of manufacture of any byproduct has several points.

In the first place, it is generally accepted accounting practice that no cost of any kind or description prior to the point of separation of the byproduct should be included.

(Testimony of C. Bruce Flick.)

The next point is that where the byproduct requires no processing to put it into marketable condition, it is customary practice simply to credit against the cost of the main product the sales proceeds of the byproduct. I will give an illustration. For example, suppose you had oyster shells, an oyster company that shucks the oysters and their main purpose [224] is to get the oyster and as byproduct they have the shells. They may be able to sell the shells to people who would like to come to the place and haul them away. They can get so much for the shells without doing anything to them. Good accounting practice in that kind of a situation would call for simply crediting the proceeds of the shells against the cost of the main product. It is simply just really, you might say, velvet from a waste that comes in incidentally and whatever they can get for it is just income.

The other type of byproduct is a byproduct needing processing. It hasn't any value until they have done something to it to put it in marketable or saleable shape. For example, I don't know whether I am permitted to mention the byproduct gypsum—

Q. Yes, I think the Court will permit you to.

A. If I could use the byproduct as an example—
The Court: Proceed.

A. Dr. Seaton wrote a magazine article which has been referred to previously here in which he described the byproduct gypsum. He said in his magazine article gypsum would be a valueless waste if it were not for the favorable location for many

(Testimony of C. Bruce Flick.)

products which enable them to get money out of it. A by product which is a valueless waste and which requires something to be done to it to put it into such shape as to give it value, there you have the problem of the cost of production or cost of manufacture of the byproduct and in such a situation—there are [225] many such situations—in such a situation the cost of producing or cost of manufacture means just those direct things that you have got to do to that product to put it in marketable shape to give it some market value.

In the case of the byproduct, gypsum as it comes off the filters there, you have got to dry it and grind it in order to give it this market value. In the case of such a byproduct the items which are properly includable as a cost of manufacture or cost of production of the byproduct are the items which you have charged to the particular product, which you have to spend in order to put it into shape so that you can get something for it.

That is the general broad principle, generally accepted good accounting practice in connection with byproduct accounting. There is a further principle in all accounting that is applicable in any circumstance and that is the accounting to be good practice, good accounting practice, should be consistent from year to year and particularly if you have a situation where the purpose of the accounting is to compare any twelve months with any preceding twelve months, it is essential to good accounting practice that the same accounting method

(Testimony of C. Bruce Flick.)

and practice and procedure be followed in one period as were followed in the other period, otherwise the comparison will not yield a correct accounting result.

Q. In such a situation, state whether or not overhead, indirect [226] or other items than these direct or actual costs of manufacturing the gypsum, according to good accounting practices, should be considered as part of the cost of manufacture.

A. Well, we have got to consider our terms. We have got to consider what we are concerned with. What you are asking me now is cost of manufacture or cost of production.

Q. Yes.

A. Now, there are lots of overhead charges which are not cost of manufacture or cost of production and an illustration of that might be, well, let's say the salary of the president of the company is not really considered a cost of manufacture because he is a general and administrative officer. The salary of the secretary and treasurer, a general and administrative man, the accountants make a general distinction between overhead items which are of a general and administrative character. Those items are not cost of manufacture or cost of production any more than is selling expense a cost of manufacture or cost of production. Overhead items which are not an actual out of pocket cost of putting this waste material into a form where you can sell it for something are not properly chargeable as cost of manufacture or cost of production.

(Testimony of C. Bruce Flick.)

Q. Will you state for the benefit of the Court what costs or what items are those that may be, according to accounting procedure, included among the cost of production, cost of manufacture of a by-product? [227]

A. Well, typical items which you would be out of pocket, which you would incur in order to put this waste material into a form which gives it market value, would be the direct labor which operates the necessary machinery to process this material, the labor to keep that machinery in repair and maintain it, the power to drive the machinery, the fuel oil or natural gas to heat where you have a drying problem. The lubricating oil and greases, or what we commonly call operating supplies for a particular machinery, those are typical items. Those are typical items which are required, you would have to spend that money to put that waste into a form which has some value so that you can get something for it.

Q. Is there a difference or distinction in accounting practice for the inclusion of items of cost between the manufacture of a byproduct and a principal or a co-product?

A. There is a very definite difference recognized by good accounting practice. In the accounting for a major product, the accounting for several co-products, or you might say several major products—another term for co-product is joint product. There is a very definite difference in accounting practice for joint products and co-products and

(Testimony of C. Bruce Flick.)

the accounting practice for byproducts. I might illustrate that by reference to the Pacific Portland Cement Company which has a gypsum plant out in Nevada. We produce agricultural gypsum. We produce gypsum for sale to cement companies as cement retarder. [228] We produce hard wall plaster. We ship some of it down to the Redwood City plant to make it into gypsum wallboard. The different forms in which that gypsum is produced at our plant among the other products, those are what you would call joint products or co-products. They are all, you might say, of equal importance. They are all major products. We bring the rock down from the quarry to make the different products from it. We don't get any byproducts at Gerlach.

Q. At Gerlach gypsum is a principal operation?

A. That is what the plant was primarily designed to produce, was gypsum products, each one of which is equally important. As an example of petty byproducts, at our Gold Hill, Oregon plant, there are dust collectors in connection with the stacks and they collect excess cement dust that otherwise would go up in the stacks and blow out over the countryside and people would complain about it. This dust that is collected in those dust collectors, a certain amount of it accumulates in the yard there in piles and then some of the farmers come along and they say, "I would like to come in and get a couple of truckloads of this cement dust, put it on my farm." So we let them come in and get it and they pay us a small price for it.

(Testimony of C. Bruce Flick.)

Q. In your accounting system do you charge any cost of manufacture against that byproduct?

A. None in that case.

The Court: The difficulty there with this latest comparison about this byproduct, it is dust and is not a commercial—you would not consider that a commercial byproduct, would you?

The Witness: Anything is commercial that you can sell for money.

The Court: You said you sold it to people—

The Witness: You don't get much for it.

The Court: Where, on the other hand, gypsum, you do.

The Witness: Yes. I am just trying to illustrate—

The Court: Yes, I understand. I did not want to interrupt.

Mr. Bennett: I wish you would interrupt any time.

The Court: If I did, I am afraid I would annoy all of you.

(Discussion as to future progress of the case, and recess taken until 2:00 o'clock p.m.) [230]

Thursday, December 11, 1947, 2:00 o'clock p.m.

C. BRUCE FLICK

resume the stand.

Direct Examination (Continued)

Q. (Mr. Bennett): Now, to give you a hypothetical case, Mr. Flick, take the case of a peach

(Testimony of C. Bruce Flick.)

canner in a situation where the principal product is the canning of peaches and incidental to that operation there results or is produced in the canning operation the pit or a stone out of a peach. If those pits are considered a byproduct and are sold without any further processing, in accordance with good accounting practices, what would be considered the cost of production of the peach pit?

Mr. Rosenberg: To which I object on the ground it is incompetent, irrelevant and immaterial. It has no possible analogy to the case where you have to go through processing and a refining process where you have—

Mr. Bennett: Well, I am coming to that. This is preliminary, Your Honor.

Mr. Rosenberg: Well, he has already testified to that.

Mr. Bennett: What do you mean by that, counsel?

Mr. Rosenberg: He has already said that under those circumstances you merely credit the sales price of the byproduct and treat it as a reduction of the cost of the main product.

Mr. Bennett: Thank you.

Q. In that hypothetical situation that I gave you, if the byproduct [231] peach pits were ground up and molded in the form of a brick or brickettes and those bricks or brickettes were sold under a contract or otherwise, what would, according to proper accounting practice and understanding, be the cost of production or manufacture of those brickettes?

(Testimony of C. Bruce Flick.)

A. That is a typical example of a byproduct. It requires further processing to put it in a form where it has some value to make it sell. The cost of production of the byproduct would be considered to be the direct and out of pocket cost necessarily incurred to put those peach pits in such form that they would have some marketable value.

Q. You mean by that what?

A. And only the direct cost of that, a machine to grind up and compress them into brickettes. You would have the cost for the operator of the machine; you would have the cost of the power to run the machine, the compressing and the cost of repairing those machines and maintaining them and the cost of lubricating oil and grease or any other supplies incident to operating the machine; the cost of shipping the brickettes, if you want to include the shipping those costs which you are out of pocket to put that product into a form which gives it some market value.

We had, if I may refer to two typical examples in my own experience, the Hawaiian Pineapple Company in Honolulu which has, I believe, the largest fruit cannery in the world, when [232] they reamed the shell from the pineapple, those pineapple shells were conveyed away and dumped in an oven, dried out thoroughly and then ground up, and they are sold as pineapple bran. That is a typical byproduct. They don't grow the fruit on the plantations in order to get the pineapple hulls. They grow the fruit in order to get the canned pine-

(Testimony of C. Bruce Flick.)

apple and canned pineapple juice, but incident to that they get this waste material which they can process and sell as a pineapple bran. The treatment of the cost of production of that byproduct was to charge the cost of that little bran unit where the hulls were dried and ground and packed into sacks and shipped.

Another typical example, in the same cannery, use was made of the waste mill juice of the pineapple; it perhaps was dirty or for one reason or another could not be canned and sold as drinkable juice. This waste mill juice was conveyed off to a little citric acid department and there it was chemically refined to get the citric acid. It came out in crystals, it come in a white powder form finally that was sold to the drug trade.

There again is a typical byproduct which requires some further processing to put it into a form where it has marketable value. In both of those cases the charges which were made to the cost of those products were the charges of those particular units where those byproducts were processed after they had been separated out from the main product.

Q. Were any of the indirect items considered as cost of [233] production or cost of manufacture of those articles, either the end waste of the shells of the pineapple or the citric acid?

A. We charged only the charges which could be very directly ascertained to be due to the operation of those particular byproducts at the time, the charges which were out of pocket expenses for put-

(Testimony of C. Bruce Flick.)

ting that byproduct material into a form where we could sell it. We did not make general allocations of overhead.

Q. Is that in accordance with your understanding of the proper accounting practice understanding of the term "cost of production"?

A. Very definitely.

Q. Would direct charges which would not have been incurred if the byproduct had not been produced be considered in accordance with good accounting practice a part of the cost of manufacture of such byproduct?

Mr. Rosenberg: What hypothesis are you assuming?

Mr. Bennett: I am assuming the abstract because you did not want me to talk about this contract.

Mr. Rosenberg: You have mentioned a number of times——

Mr. Bennett: I am talking about the answer in your interrogatories. You said in answer to interrogatory 10-G, "None of the direct charges shown in Exhibit F," namely, the direct charges for labor and actual production of the byproduct, the drying and grinding and delivery to the plaintiff, "would have [234] been incurred if no gypsum had been produced." In those direct charges you assessed or claimed against the plaintiff here, which the plaintiff has agreed at all times to allow as cost, increased cost, as the evidence has shown, you said in answer to the interrogatory that none of those

(Testimony of C. Bruce Flick.)

charges would have been incurred if no gypsum had been produced. My question to the witness is whether those charges which would not have been incurred if the byproduct had not been produced are the charges for the cost of the production or manufacture of the byproduct.

The Witness: The direct charges which are necessary to put the byproduct into form giving it marketable value, those charges that would not have been incurred if the byproduct had not been produced are very definitely the cost of production of the byproduct.

Mr. Bennett: Now, I refer, counsel, for your information, to the same answer in the interrogatory which reads—which are all the other charges that you have asserted as a part of your cost of production—“indirect charges shown on Exhibit F that would have been incurred if no gypsum had been produced but in lesser and unascertainable amount.”

Q. Now, I will ask you, Mr. Flick, whether according to accounting practice and understanding, indirect charges which would have been incurred if no gypsum had been produced but in lesser and unascertainable amounts would be cost of manufacture [235] or production and treated as such.

A. In good accounting practice for a byproduct one should not charge to the cost of manufacture of the byproduct indirect or overhead charges which would have been incurred regardless of whether or not any of the byproduct was produced and one

(Testimony of C. Bruce Flick.)

should not charge as a cost of production of the byproduct any amounts of indirect or overhead charges which are unascertainable.

Q. Now, I direct your attention to Exhibit F of the Defendant's answers to Plaintiff's interrogatories.

Mr. Rosenberg: Are you placing it in evidence?

Mr. Bennett: Well, I think I am entitled, Your Honor, to treat the answers to these interrogatories as an admission of a party and admissions are always evidence and certainly can be used for the purpose of allowing an answer to a question.

Mr. Rosenberg: If the witness is going to be interrogated, I ask that the exhibit as to which he is being interrogated be made a part of the record.

Mr. Bennett: Counsel, I don't have to do that. I am not going to introduce a lot of self-serving declarations that you have made in these answers to interrogatories as a part of the plaintiff's case, but I think it goes without saying, Your Honor, that where the parties pursuant to the rules of procedure have filed in this court answers to the various and sundry interrogatories that have been filed that I can refer in [236] interrogating a witness to an answer, particularly where it pertains here merely to a list of items which obviously are a list of items that the defendant has revealed by other evidence in the case given by this witness, the various charges and alleged costs that make up the total cost that they are claiming for the production and manufacture of the gypsum.

(Testimony of C. Bruce Flick.)

The Court: His objection goes — what is this document? What is this document you are reading from?

Mr. Bennett: I am about to show the witness Exhibit F that the defendants filed in this Court as a part of their answer to the interrogatories which the plaintiff propounded.

The Court: The objection will be overruled.

Q. (Mr. Bennett): Mr. Flick, I hand you herewith a copy, or I show you herewith a copy of Exhibit F appended to the reply of the defendant to interrogatories propounded to defendant by plaintiff. I will hand Your Honor a copy just for such reference——

The Court: I am in doubt about going into interrogatories, as to what degree we should go into them. They speak for themselves. They are a part of the record in the case. Are you familiar with these interrogatories?

The Witness: Yes, sir, I have seen them.

The Court: You might indicate for the purpose of the record so we will have a proper record, the purpose of this offer.

Mr. Bennett: I am not offering it, Your Honor, as [237] evidence. I am merely showing it to the witness, the particular document, the particular list, Exhibit F that the defendants have filed here in answer to interrogatory lists the items of cost for two periods; first, the period July 1, 1944 to June 30, 1945, and the period July 1, 1945 to June 30, 1946 upon which the defendants claim their third

(Testimony of C. Bruce Flick.)

increase over their list. For example, Your Honor, it shows claim for supervision, labor, operation, labor and repairs, materials, bittern water, power, gas, fuel oil, sulphuric acid, overhead.

The Court: Proceed.

Mr. Bennett: I don't think those matters are in dispute because the witness has already testified about these matters and it seems to me a convenient matter of reference; the defendant has admitted by filing this document that these were the items of cost that they included in their claim for an increase.

Q. Directing your attention to the words and figures in sub-paragraph (b), Mr. Flick, beginning with the word "supervision" over to the right, "allocation," will you state whether or not according to accounting practices and understanding, that is a cost of production of the byproduct gypsum.

Mr. Rosenberg: Just a moment. Before the witness answers I want to renew my objection. I am speaking of the record, if the Court please. Just contemplate the record in this case. He is showing him an exhibit, a written document, then he is [238] asking him a question relating to the document and the witness is going to come up with some answer. If it becomes necessary to read this record, no one can tell from the record what document, what is contained in the document as to which this witness is giving the testimony. I think before the witness is asked a question of that kind, the document should be made part of the record and the only

(Testimony of C. Bruce Flick.)

way it can be a part of the record is by being offered as such. I think if somebody was to read this record it wouldn't be an intelligible record, it could not possibly be where a witness is interrogated regarding a document that no one reading the record can tell what is contained in the document.

The Court: For the purpose of identifying the document and what we are talking about, the record should disclose it if it has not already done so.

Mr. Bennett: I will ask that the answers to the interrogatories of the defendant be marked for identification, if that is necessary, or I would limit it and suggest it this way, Your Honor. It is not necessary, but if counsel sees any conceivable purpose that this exhibit F to the answer should be marked for identification—I want to point out the wholly specious nature of this thing. Counsel knows exactly what these things are. If there is any incorrection of the words or figures used by the witness, it can be corrected at the time. Defendant was the one who offered it, Your Honor. The record is not going to [239] be hurt. There is not going to be any confusion by using some document that the defendants have furnished, officially furnished pursuant to the rule requiring them to do so.

What counsel wants me to do, I submit it is a trick practice, he wants me to offer in evidence and thereby be bound by all these self-serving declarations that are contained in his answers to interrogatories and I am not going to do it and I should not be required to do that.

(Testimony of C. Bruce Flick.)

The Court: It would be well to ponder a moment. All these communications that traveled between the parties, there are so many of them, they are argumentative. I allowed it as I do in most cases, I allow the widest latitude so we can get at the merits, but you are offering the contents of these interrogatories on file.

Mr. Bennett: Exhibit F, Your Honor, the defendant's interrogatories, I offer that F now for identification. I am not offering it in evidence because the only purpose it serves now is for a preliminary question to this witness.

The Court: Well, after the preliminary question where are we going?

Mr. Bennett: The matter will be clear. I will tell you what I want to do.

The Court: Pardon me. It is my thought that if you are going to interrogate him on this document, or a part of it and limit it and possibly direct your examination going into the [240] contents of it according to that limitation.

Mr. Bennett: I will do it. I will offer Exhibit F as the next exhibit in evidence for the plaintiff as representing the items and the basis for the claim that such items according to defendant's contention constitute items of cost of the manufacture or cost of production of gypsum because that is all it is.

The Court: Let it be admitted and marked for that purpose.

(Testimony of C. Bruce Flick.)

(The document in question was marked Plaintiff's Exhibit No. 15 in evidence.)

PLAINTIFF'S EXHIBIT No. 15

	July 1, 1944	July 1, 1945
10.	June 30, 1945	June 30, 1946
(a)	\$2.52	\$3.24
(b) Supervision (5)	.04	.04 Allocated
Labor-Operations	.32	.35 Actual time card dist.
Labor-Repairs	.21	.25 Actual time card dist.
Materials-Operations	.02	.05 S'room req. & Direct Purch.
Materials-Repairs	.11	.20 S'room req. & Direct Purch.
Bittern (1)	.18	.16 Arbitrary Allocation
Water	.02	.02 At cost—measured
Power	.14	.14 At cost—measured
Gas	.10	.11 At cost—measured
Fuel Oil	----	.01 At cost—measured
Sulphuric Acid	----	.35 At cost—measured
Overhead (2)	.74	.88 Allocated—labor basis
Taxes, Ins.,		
Depr. (3)	42	.39 Allocated—% roughly based on Plant value
Inter-departmental charges	.01	.01 At cost
Ship. Expense (4)	.21	.28 Actual cost plus pro-rate Misc. Ship. Exp.
(c) (1) Gypsum	.18	.16 per ton
Bromine	12.75	13.29 per ton
Magnesia	.72	.73 per ton
(2) Gypsum	6.3%	7.8%
Service Accounts	1.9%	3.1%
Lime	8.9%	9.4%
Ethylene Dibromide	12.8%	6.3%
Magnesia	70.1%	73.4%
(3) Gypsum	9.0%	9.6%
Service Accounts	4.1%	3.6%
Lime	26.3%	26.8%
Ethylene Dibromide	12.5%	10.1%
Magnesia	48.1%	49.9%
(4) Gypsum	24.0%	46.7%

(Testimony of C. Bruce Flick.)

	July 1, 1944	July 1, 1945
10.	June 30, 1945	June 30, 1946
Ethlyne Dibro-		
mide	4.0%	0.5%
Lime	6.4%	4.5%
Magnesia	65.6%	48.3%
(5) Gypsum	18.8%	26.0%
Ethylene Dibro-		
mide	2.3%	1.1%
Lime	6.3%	6.0%
Magnesia	72.6%	66.9%

Mr. Bennett: I might say parenthetically these items are already in the record in another form. I am merely using it as a method of comparison, thinking it would be less objectionable.

Your Honor also stated, and Your Honor will please forgive me if what I am about to say is in any sense a critical statement, but Your Honor said you allowed a great deal of hearsay here. I think Your Honor also qualified that by another inclusion, all that the witness testified to in these letters and memoranda was not hearsay, it was expressions between the parties and it is not hearsay when both sides are present and they are discussing something.

The Court: I wish I was blessed with the finality that some of you attorneys who come in here have. I have my own [241] failings. What I intended to say was argumentative.

Mr. Bennett: That is correct in this——

The Court: 50 per cent.

Mr. Bennett: This evidence was involved because of one side stating its position and the other stating its position.

(Testimony of C. Bruce Flick.)

The Court: It would be a good argument before the jury.

Mr. Bennett: And I think Your Honor will also find it is a pretty good argument before this Court because after all Your Honor is to decide the question on the interpretation and what both parties were saying is a matter that Your Honor can consider. I don't say Your Honor is necessarily bound by everything that was said, but I agree that Your Honor's ruling would be quite right and quite within the proper realm of evidence and I am sorry that I have even prolonged the trial here by the comments I have made.

Q. Directing your attention again, Mr. Flick, to Exhibit 15, wherein the items or claimed items of cost asserted by the defendant are set forth, I direct your attention to the item, "Supervision." State whether or not, in accordance with good accounting understanding and practice that is an item of cost of the manufacture or production of the by-product gypsum.

A. Supervision of a general nature, which the plant would have anyhow, if it did not produce the by-product gypsum, and which the plant was not able to ascertain how much of it is due to the production of the by-product, is not a part of the actual cost of the manufacture of a by-product under good accounting principles.

Q. Take next the item, "Labor operations." By the way, let us go back to the first one. I notice opposite the word "Supervision," there is for the

(Testimony of C. Bruce Flick.)

first period 4 cents and for the second period, comparative period, namely, from July 1, 1945 to June 30, 1946, 4 cents is again set up, showing no increase, and the word opposite is the word "Allocated." According to good accounting practice what does that mean to you?

A. What does the word "allocated" mean?

Q. Yes.

A. The word "allocated" signifies that the actual amount was not ascertained, and some portion of it was charged on some computation basis.

Q. And you would not consider that from an accounting point [244] of view cost of manufacture?

A. I do not consider that that would be cost of manufacture for the purpose of good by-product accounting.

Q. Take the next item, "Labor operations," which showed for the first period July 1, 1944 to June 30, 1945 32 cents per ton, and in the second period, July 1, 1945 to June 30, 1946, 35 cents, the words, "Actual time card dist."—what is that?

A. I take for granted that means "Distribution."

Q. State whether that would constitute a cost of production or cost of manufacture of the by-product gypsum?

A. The labor employed in the actual operation of the machinery which dries, grinds and ships this by-product gypsum, as ascertained to be due to that (and that is the meaning of the words, "actual time

(Testimony of C. Bruce Flick.)

card distribution) is correctly charged. There is no question about the correctness of charging that to cost of manufacture.

Q. When you discussed this matter with the defendants down in Newark, you accepted that charge, did you not?

A. Yes, we have not questioned any direct charge.

Q. To speed the matter along, I will ask you the same questions I have asked before, as to the items of supervision and labor operations as to the remaining items of paragraph B of this Exhibit F.

A. Do you mean you would like me to go down the line and comment on each one? [245]

Q. That is right.

A. Labor repairs, actual time card distribution, under good by-product accounting practice, the labor actually engaged in repairing the machinery used in processing the by-product, drying, grinding and shipping this gypsum, is chargeable to the cost of the manufacture of the by-product gypsum.

Q. And you understand that particular charge to be such a case, do you?

A. Yes, the words "actual time card distribution" signify to me that they actually kept track of the men's time, so that the men who worked on that, repairing that by-product processing machinery, their time was actually ascertained and was charged.

Q. And you accepted their representation as to that, did you?

(Testimony of C. Bruce Flick.)

A. Yes, there is no question about that.

Q. Take the next item.

A. Materials operations. There appears opposite that, "S'Rm." And I assume that means "Storeroom"; the letters, "Req.," I assume mean requisitions; and "Direct Purch." I assume means purchases. In other words, I take it for granted that that means, "Storeroom requisitions and direct purchases."

Now, that "Materials operations" charged on the basis of storeroom requisitions and direct purchases, under good by-product accounting practice, where you have to use certain materials in operating the machinery which processes your [246] by-product, and you charge the actual materials which you pull out of your storeroom for the purpose, and you charge them at the actual cost, and then you may have other materials which you may buy directly which do not come from the storeroom, and you charge those at the actual cost, that is properly chargeable to the cost of manufacture of the by-product.

Q. Go ahead.

A. The next item is materials repairs, storeroom requisitions and direct purchases, and there again where that is material which is actually used in the repairing of machinery which processes the by-product and it is charged, it is ascertained, it is kept track of so it represents the actual material used in the repair, is withdrawn from our storeroom or brought directly and used without going through

(Testimony of C. Bruce Flick.)

the storeroom, that is properly chargeable to the cost of the manufacture of the by-product. There is no question about that.

Q. So those two items you were willing to accept and concede with the defendants, were you?

A. There is no question in the principle. I believe there was a 1-cent difference there, which Mr. Bannard pointed out, but that is petty. We do not need to talk about that now, and it does not involve the principle I just enumerated.

Q. With the exception of that 1-cent difference, where, as I understand it, you contended that they had 1 cent more than they were entitled to for those two direct claimed items, [247] Materials Operations and Materials Repairs, you were willing to accept in the first case, Materials Operations, a 3-cent or a 2-cent increase, as the actual fact shows, and this next item, Materials Repairs, the 9 cents claimed increase you were also willing to accept?

A. There is no question about the Materials Repairs. I think the materials operations was the item in which we had a 1-cent difference. There was a change in accounting method for an air compressor. That does not affect the principle in charging materials, as I have stated it.

Q. In that particular illustration what did you find? That there was an actual 3-cent increase, or only a 2-cent increase?

A. 2-cent.

Q. In other words, the figure 5 cents in the right-hand column should have been 4, is that correct?

A. Yes.

(Testimony of C. Bruce Flick.)

Q. Take the next item, Bittern.

A. No part of the bittern is properly chargeable as a cost of production of the by-product, because the bittern is the raw material which comes into the plant for the manufacture of the major product, and the general principle, commonly accepted by good accountants for by-product accounting, is not to charge the by-product material with anything prior to the point when the by-product is separated out, because, as I have stated, the cost of actually putting that waste material into a form [248] which gives it market value is the cost which is chargeable.

Q. Just pause there for a minute, and let us take that hypothetical situation of the manufacture and sale of these briquets made out of by-product, the pit of the peach by a fruit canner. Would the proper accounting practice to allocate to the cost of the manufacture or the cost of production of that briquet any part of the cost of the peach that comes from the farmer?

A. It would not. I mentioned the case of the pineapple cannery, which is also in point. We did not charge the cost of the bran or the cost of the citric acid with any part of the cost of the pineapples which were grown for the purpose of making canned pineapple.

Q. Take the next item, Water.

A. "Water at cost measured." Now, if you have water which is actually necessary in the processing of this by-product gypsum, after the point of sep-

(Testimony of C. Bruce Flick.)

aration, and you have kept track of the actual water; you have measured it; you have ascertained, there is no question about that being properly chargeable as a cost of manufacture of a by-product.

Power likewise. You have to use power to run your machinery to process this by-product and put it in marketable condition, and if you keep track of your power and ascertain actually what the cost of it was—it says here at cost measured—that is properly chargeable as cost of manufacture of the by-product. [249]

Q. In that particular case there was no claimed increase for power for that second period?

A. No, these particular figures are the same for both periods.

Q. Take the next item, Gas, wherein there is a 1-cent claimed increase.

A. Gas, again. It says "at cost measured." Now, that means, or if we assume that that means that the gas actually used in the drying of the gypsum was actually measured and ascertained to be of this amount of cost, that is a direct charge. There is no question about that being properly chargeable to the cost of production of the by-product gypsum.

Q. What about fuel oil? Would you say the same thing?

A. Fuel oil is the same as gas. The same principle applies. There is no question about that.

Q. Now we come to the item Sulphuric acid, which for the period July 1, 1944 to June 30 1945 there is no cost shown, but for the next annual

(Testimony of C. Bruce Flick.)

period it is shown to be 35 cents per ton at cost measured. What would you say about that item?

A. Sulphuric acid, which is added to the bittern, is not something which is necessary in the processing of the by-product after the point of separation, and sulphuric acid, therefore, under the principle that we have stated, would not be chargeable to the cost of manufacture of the by-product.

Now, there is another phase involved in the sulphuric acid [250] charge, and that is that we are dealing with two accounting periods of 12 months, and it is basic in good accounting practice that you should not change your accounting methods from one period of twelve months to the next period of twelve months if you are going to have to base something on a comparison of the two.

Q. In other words, there are two reasons why you would exclude sulphuric acid from being a cost of producing or manufacture of gypsum?

A. That is correct. There might also be a third reason, but that involves chemistry, and if I am permitted to state my understanding of it I will state it, and that is the sulphuric acid, as Dr. Seaton stated in his article, which we have referred to previously, the sulphuric acid was added because the bittern had a slight and variable alkalinity which made its processing difficult. Now, therefore, if you are primarily producing a major product and you add this material to make the processing, to facilitate the processing for the major product, again it should not be charged as the cost of manufacture of the by-product.

(Testimony of C. Bruce Flick.)

Q. It is your understanding, is it not—and I do not think there is any dispute on this—the total cost of all the sulphuric acid that was added, as counsel says, to this bittern is charged or sought to be charged for this last period, July 1, 1945 to June 30, 1946, against the by-product gypsum, is [251] that not correct?

A. That is my understanding.

Q. Let us turn to the next item, a big one, Overhead.

The Court: Go back to that last question and answer. Read it, Mr. Reporter?

(Record read.)

The Court: Proceed.

Mr. Bennett: Does that answer your Honor's inquiry?

The Court: Yes.

Mr. Bennett: In other words, prior to that time they charged the sulphuric acid to other products. Mr. Flick pointed out Dr. Seaton, of the defendants, stated the sulphuric acid was necessary to condition this bittern so they could manufacture magnesium oxide, the principle product, and the witness has stated that that is a third reason why sulphuric acid should not be charged to the by-product gypsum.

Mr. Rosenberg: I am not going by my silence to be taken to have agreed with your very cavalier statement. The fact of the matter is prior to this time the bromine plant had been continuously in operation and the sulphuric acid was necessary to

(Testimony of C. Bruce Flick.)

the production of bromine. Prior to 1945, for that reason, all the sulphuric acid was charged to the bromine plant. In 1945, for good and sufficient reasons, the production of bromine was discontinued. Therefore, there was no preceding product to which the sulphuric acid could be charged. [252] I do not want it to be understood as conceding that this was just an arbitrary change in accounting practice. It was not. Furthermore, I do not know that the court has read Dr. Seaton's article. I doubt very much that there is any statement made in that article that sulphuric acid was necessary for the production of magnesium. That has been an assumption that has been indulged in throughout the testimony. I call it to Mr. Bennett's attention.

Mr. Bennett: I still stand on exactly what I said and what this witness said, and if you want to go into that it can be demonstrated beyond a question of doubt. Counsel has seen fit to inject this thought into it. I want to clear it up and put it at rest: This is what Dr. Seaton said in describing the necessary steps in the manufacture of magnesium oxide, and I read from the article which is in evidence, if your Honor please, and I read from page 640:

"Raw bittern has a slight variable alkalinity which makes its further processing difficult. Accordingly, from the storage ponds it is pumped to a large surge tank, from which it issues as a controlled stream into which the necessary quantity of concentrated sulphuric acid, to give essential neutrality, is introduced by a proportioning pump. The

(Testimony of C. Bruce Flick.)

flow then passes to concrete reservoirs which hold several days' plant supplies. From these reservoirs the neutral bittern—the neutral bittern after the sulphuric [253] acid is added—is pumped to an elevated supply tank.”

And then he goes on and discusses the process of manufacture. There will also be evidence on this, as I understand, from both the defendant and the plaintiff, your Honor. I simply attempted to summarize—perhaps that was unnecessary—the three separate and distinct points, any one of which this witness said were according to good accounting practice.

Mr. Rosenberg: May I just call the court's attention to the fact that the paragraph that counsel read from this article was taken from Dr. Seaton's dissertation upon the recovery of bromine from bittern? That is exactly the point I made to the court, that the sulphuric acid certainly is necessary to the production of bromine, and during the time that bromine was being made it was charged to bromine. Of course, this article was written back in 1931, which is six years before this plant was even constructed. But I do not want the article misquoted.

The Court: We will now proceed to the overhead, which is the next item, gentlemen.

Q. (Mr. Bennett): What would you say about that, Mr. Flick, whether or not, according to good accounting practice and accounting understanding, overhead should or should not be included in the

(Testimony of C. Bruce Flick.)

cost of production, or the cost of manufacture of the by-product gypsum?

A. Well, I read "Overhead allocated labor basis." First of all [254] under good accounting practice for a by-product you should charge the cost of production of the by-product with the actual out-of-pocket expense which you are put to in order to get that by-product into such form that it has marketable value. You should not charge the cost of manufacture of the by-product with overhead, which you would have even if you discontinued the manufacture of the by-product, and the amount of which you cannot definitely ascertain as necessary to put the by-product in its marketable condition. It is not good accounting practice to allocate overhead to a by-product, where the amount is not ascertainable.

Q. Are there any other reasons?

A. I think that pretty well covers it.

The Court: There is an interesting item now coming up, Taxes, in which there was a reduction from 1944 to 1945. What about that item?

Mr. Bennett: Which is that, your Honor?

The Court: The next item of Taxes.

The Witness: "Taxes, Ins."—I think it means insurance—and I believe "Depr." means depreciation, and I read opposite that, "Allocated percent roughly based on plant value."

The Court: There was a reduction in taxes. That is what I was interested in.

Mr. Bennett: Your Honor, I might comment at

(Testimony of C. Bruce Flick.)

this time we do not get any benefit of the reduction of cost. Is only [255] where the costs go up.

The Court: Looking at this, I was rather taken by surprise because there was a reduction of taxes. Proceed now, gentlemen.

Mr. Rosenberg: That is another statement that is not true. You certainly do get the benefit of the reductions to the extent that they reduce increases.

Mr. Bennett: Well, we are getting perhaps into a side point.

The Court: Proceed.

The Witness: The question of taxes depends, first of all, upon what taxes we are talking about: Social Security taxes, which are directly due to the labor payroll which you have, would be in your by-product department, where you process this by-product material; the Social Security taxes applicable to those workmen who are directly employed there—such taxes are chargeable to the cost of production of the by-product. There is no question about that, in my mind. Then you may have property taxes, and property taxes generally are assessed on an entire plant, and there is no definite ascertainable charge for the property taxes on the machinery that is used in drying and grinding your by-product.

The Court: "Plant value," it says here.

The Witness: It says, "Roughly based upon plant values allocated." Where you cannot ascertain the amount, in my opinion, you should not charge the cost of manufacture of a by-product.

(Testimony of C. Bruce Flick.)

You have other forms of taxes, such as corporation franchise taxes, which very definitely would not be a cost of [256] manufacture. We are concerned with cost of manufacture and not with general administrative costs, or selling costs, or anything of that sort, the cost of doing business. Well, a corporation franchise tax might be of that nature. Any taxes of that sort are not chargeable. In fact, your property taxes do not arise directly out of the manufacture of the by-product. They are assessed by an outside governmental agency, and the tax rates are fixed by things that have nothing whatever to do with the manufacture of the by-product.

The item "Insurance": There, again, we do not know what type of insurance we are talking about, but in general Workmen's Compensation Insurance, which applies to the men who work in the processing of the by-product is chargeable as a cost of manufacture of the by-product. But when you get into some other forms of insurance, maybe the company has use and occupancy insurance to protect itself in the event the plant is stopped by fire from producing, or if you have insurance which is purely of a financial protection nature, that is not cost of manufacture of a by-product. If you discontinue the by-product you may have insurance anyway, and the amount of the insurance allocable to the by-product may be unascertainable.

Q. Going back for a minute to overhead, where-in they set forth for the first period 74 cents and in the second period 88 cents, assuming that those

(Testimony of C. Bruce Flick.)

charges, or that item, or the charges that are included in the general term "Overhead" would have been incurred [257] if no gypsum had been produced, but in lesser and unascertainable amounts, would any of them be, according to good accounting practice and understanding, included as cost of production, or cost of manufacture of the by-product?

A. In my opinion they would not be chargeable properly as cost of manufacture of the by-product. Any item that you would have anyhow, even if you quit making the by-product, or which you could not ascertain the amount of it chargeable to the by-product, should not be charged to the cost of manufacture of the by-product. For example, included in this overhead is an item of New Products Research.

Q. (The Court): Where did you get that?

A. From our previous examination of the figures.

Q. I see.

A. We know that that is part of it. By no stretch of the imagination, in my opinion, is New Products Research properly chargeable as a cost of manufacture of the by-product. You do not have to research on new products in order to dry, grind, and ship the by-product. It is just unrelated. It is not chargeable under any type of good accounting practice.

Q. (Mr. Bennett): Is it good accounting practice and in accordance with your understanding of accounting practice to allocate any indirect cost,

(Testimony of C. Bruce Flick.)

aside from any other consideration on a basis of labor comparisons, that is, the cost of labor involved in the direct manufacture of the by-product as against [258] cost of labor for the major or primary or over-all operation, excepting the manufacture of the by-product?

A. I think that I have already stated that it is not good accounting practice to charge to the cost of manufacture of a by-product overhead items where you can't ascertain the amount that is chargeable, and you would have the overhead anyway if you quit making the product. Your present question is directed to the basis of allocation. Now, I have already said I do not think they ought to be allocated, but if, under some system of accounting, a company chooses for its own purpose to try to allocate to its by-product charges which it is not able to ascertain belong to the by-product, if they want to allocate, why, then, they should try to find a basis of allocation which is logical and related in some manner.

Now, to take an arbitrary labor basis, it has the convenience of uniformity. It is the procurustean bed, if you like. It makes everything fit—the percentage of labor, whether labor has anything to do with it. For example, if you allocate laboratory research on a payroll basis, there is no possible relation between the two.

Q. In addition, Mr. Flick, to those reasons, I am going to ask you this: In the case of a by-product where you are concerned with determining

(Testimony of C. Bruce Flick.)

the cost of manufacture or the cost of production of that by-product, where another cost is involved, not only the convenience of the manufacturer, himself, but where [259] someone else would be affected by the correct determination of cost of production, state whether or not, according to good accounting practices, any indirect items should be considered or classed as a cost of production or manufacture of the by-product?

Mr. Rosenberg: I want to be sure if I understand that question. You are asking him now whether the same good accounting practices would apply where somebody else is affected as where you, yourself, only are affected? Is that the question?

Mr. Bennett: No, I think the question speaks for itself, unless the Court has some inquiry.

The Court: If there is any question about it reframe the question.

Mr. Bennett: Q. You have spoken of the matter of accounting, whether it be good accounting practice or not, for a manufacturer to set up any system of allocation. If the object of the accounting system was to determine not only for the convenience of uniformity or otherwise of the manufacturer, himself, but where there is a purpose to determine, say as in this case, the amounts of any price increase that a buyer of the by-product would have to pay, dependent upon any actual increase or advance in the cost of manufacture, state whether or not in accordance with good accounting

(Testimony of C. Bruce Flick.)

practice indirect items are considered as cost of manufacture? [260]

Mr. Rosenberg: I will object to that on the ground it is complex, compound, unintelligible, incompetent, irrelevant and immaterial, and calls for the opinion and conclusion of the witness on a question of law; whether or not under the circumstances of this case indirect costs are properly includable in the cost of production of gypsum is a question of law for the Court to determine, according to the contract that the parties entered into.

Mr. Bennett: I have the greatest respect for this Court. Your Honor knows that. But your Honor may be a certified public accountant; I am not, and this is merely a question calling upon this witness, an admitted expert, for what the accounting practice is. I am not asking him to decide this case. Your Honor is. But he, being a witness here, is certainly qualified to express an opinion. If your Honor does not believe him, of course you can disregard it. But he is entitled to express an opinion in this case as to whether or not, where some interest is concerned, where the purpose of the accounting in this particular situation has to do with keeping the actual cost of production or manufacture in mind, this witness is qualified to testify as an expert, and that is all I have asked him. He is not indulging in any conclusion of law. He is talking about what is accounting practice, according to his understanding.

(Testimony of C. Bruce Flick.)

Mr. Rosenberg: Obviously the only relevancy that that could have would be to determine whether or not, or help the [261] Court to determine whether or not in this case it is proper or is not proper to include indirect costs by reason of the fact that Pacific will be affected. I submit, therefore, the question as to whether or not it is proper to include direct costs in this particular instance, because Pacific will be affected, is to be determined by the Court in view of the contract that Pacific entered into, and it is not for this witness or any other expert witness to say whether or not the fact that Pacific is going to be affected is to change the accounting practice. That is a question of law, I submit, for the Court to decide.

The Court: The phrase, "Indirect charge" has been used repeatedly here.

Q. It has been your testimony thus far, as far as your testimony goes, that the only proper tax or charge, rather, is to the gypsum, itself, because it is a by-product. Am I correct? You may correct me if I am in error.

A. The gypsum is a by-product.

Q. Yes.

A. Good by-product accounting charges to the cost of production of the by-product, No. 1, nothing prior to the point when it is separated out; No. 2, those direct charges which are out-of-pocket expense and necessary to put that by-product material in such shape that it is worth something. In the case of this gypsum you have to dry it, you

(Testimony of C. Bruce Flick.)

have to grind it, and you have to ship [262] it.

Q. I understand you have indicated that that is a proper charge.

A. That is perfectly proper.

Q. I understand.

A. Now we come to the indirect or overhead charges. Those charges, those overhead charges which you would have anyway, whether you processed the material or whether you pumped it into the bay, those charges which you cannot directly ascertain were caused by this processing of by-product, those charges are not properly chargeable.

The Court: I think that clears up the situation. It is time for a recess in any event.

(Recess.) [263]

Mr. Bennett: Q. Mr. Flick, I wish, going back to this item of overhead or indirect items, you would again review to the Court whether or not according to good accounting practice and understanding, those items are to be included in the cost of manufacture of by-products and the reasons, if any, why they should be included or not included.

Mr. Rosenberg: To which I object, if the Court please, on the ground it has been asked and answered not once but three or four times, and incidentally, I asked the Reporter to give me a transcription of the witness' last answer to the last question and I got it, and counsel got it, and if this is an attempt now to alter his testimony, I am going to object to it and I submit the question has been asked and answered half a dozen times.

(Testimony of C. Bruce Flick.)

The Court: Well, it won't be answered again. I will allow it now, in order to clear up the whole situation. You may answer.

The Witness: The question was whether overhead and indirect items should be charged to the cost of manufacture of a by-product. Is that the question?

Mr. Bennett: That is the question.

The Witness: The answer to that question is that good accounting practice as a general principle does not charge overhead and indirect items to the cost of manufacture of a by-product, and in addition to that, where you have other items [264] which, as I said, you would have them anyway, whether you produce a by-product or waste the material, and you have other items which you can not ascertain that they are directly necessary to the process of a by-product; items of that kind are not chargeable to a by-product.

Q. Thank you, Mr. Flick. Now, turning to the last item of the last—I don't think you said anything about depreciation. You mentioned taxes and insurance. Any depreciation, Mr. Flick?

A. Depreciation. Opposite depreciation I see that it says "allocated per cent roughly based on plant value."

Now, in accounting for a by-product, the only depreciation which would be properly chargeable to the cost of manufacture of the by-product would be depreciation on the machinery and equipment actually used to process a by-product to put it in

(Testimony of C. Bruce Flick.)

condition to market it. It would not be good accounting practice to prorate and charge to the by-product a part of a general plant or equipment used for processing prior to the point of separation. To go into by-product accounting, you have the problem in depreciation of the method used for depreciation. A straight-line method of depreciation, for example, would not be correct because you would write off the cost of a machine at a fixed amount per annum over the number of years you expect to use it and it should be written off on a production basis of so much per ton, or a fixed amount per ton instead of having a [265] fluctuating amount per ton because the tonnage fluctuates.

You have also the question of the depreciation upon a fixed percentage, which would be correct for a company using it but not correct if the company were trying to ascertain the cost of production of a by-product or somebody else might be involved. I am thinking of this type of thing. We have, for example, in Pacific Portland Cement Company a plant built for the production of gypsum wall-board. That plant was built under a wartime certification of necessity and the government issued a certificate of necessity which permitted the company to write that plant off over a five year period, and the plant was written off over a five year period, so it is completely written off the books. But it is still there and still operating. It was good accounting practice to write that plant off over a five year period for its own purpose, but it would

(Testimony of C. Bruce Flick.)

not have been good accounting practice if somebody else might have been involved in it. So on depreciation you have got the depreciation on a production basis for just what machinery which is used in the processing of the by-product itself, after its point of separation.

Q. You would be willing, then, to concede in this case that depreciation on that basis should be included among the charges or the costs.

A. I think so, because that would be correct accounting practice. [266]

Q. How much in a case where depreciation is allocated on some basis, generally allocated on some system, you mentioned the five year period, and the special situation with the wallboard plant. State whether or not that would be a proper basis.

Mr. Rosenberg: To which I will object on the ground the proper foundation has not been laid for that. There is no showing here there was any 20 percent a year depreciation on the basis of the wallboard plant.

Mr. Bennett: I did not say it was the same. I said allocated on any basis. For example—well, to save time, I will withdraw the question. I don't want to argue about these matters.

Q. Would any plan of cost accounting that allocated depreciation without reference to the specific factors that you mentioned as being the proper basis for figuring depreciation be in accordance with good accounting practice?

(Testimony of C. Bruce Flick.)

Mr. Rosenberg: To which I will object on the ground there is no foundation. The statement which has been presented to that witness shows that the depreciation is allocated on the basis of the plant value and that obviously means the gypsum plant value as related to the entire plant.

Mr. Bennett: I thought my question was even broader and more beneficial to you than that, but I will narrow it. Would it be proper in accordance with good accounting practice, to allocate depreciation on a percentage, roughly, basis on plant [267] value?

A. I assume that it means that they take the depreciation for the whole plant and they figure the value for the whole plant and then figure the value of the by-product plant and, let us say, the value of the by-product plant is, say, 10 percent of the value of the whole plant, then they charge the by-product cost with 10 percent of the depreciation of the whole plant. That sort of thing, in my opinion, would be incorrect accounting for the cost of manufacture of a by-product. There are two more items on this list: there is an interdepartmental charge—

Q. Go ahead.

A. That is when a charge is directly ascertained to be due to the processing of the by-product. That would be properly a cost of manufacture of the by-product. The item of shipping expense opposite it, it says, "actual cost plus pro rate of miscellaneous shipping expense." There again there would be properly chargeable a cost of shipping

(Testimony of C. Bruce Flick.)

the by-product, whatever actual direct labor is. If you had one man with a Fuller-Kinyon pump getting the gypsum out of the storage bin into the freight cars, that actual expense of labor would be chargeable to the cost of shipping the by-product, but any pro rata of indirect or miscellaneous shipping expense would not be good accounting for the by-product.

Q. While these figures can be ascertained arithmetically, I wonder if you can advise us now, Mr. Flick, according to your [268] own computation, the amount of money which you have paid to the defendant which is in dispute, that is, which you have protested and for which the plaintiff claims recovery here. Perhaps we can stipulate to this because it is a matter that really is not in dispute.

The Court: Let it go in subject to correct.

Mr. Kaapcke: I will state the situation this way: Since the plaintiff began paying the rate of \$3.76 a ton and up to the time when this suit was filed, certain amounts of gypsum were paid for; they were delivered and paid for. In order to determine how much refund we might be entitled to once the correct price had been determined, we want to get those tonnages in the record. I will read into the record the tonnages subject to verification. They are willing to stipulate to those tonnages subject to verification.

The Court: Very well.

Mr. Kaapcke: In September there was a payment of 953.5 tons at \$3.76. In October there was

(Testimony of C. Bruce Flick.)

a payment for 2339.43 tons also at \$3.76. In November there was a payment for 1798.08 tons at \$3.76. In November there was also a payment for 1656.81 tons at \$4.48. December there was payment for 2691.49 tons at \$4.48. In January, 1947, there was payment for 2851.01 tons at the price of \$4.48. Ensuing payments have been made into the registry of the Court under an order of the Court and speak for themselves. [269]

Mr. Bennett: You may cross examine.

Cross Examination

Mr. Rosenberg: Q. Will you enumerate the products that Pacific Portland Cement makes?

Mr. Bennett: We object to that as incompetent, irrelevant and immaterial.

Mr. Rosenberg: The witness has repeatedly said, he has repeatedly used his experience in the Pacific Portland Cement Company and their methods of accounting, to illustrate the expert opinion that he has expressed. I think we are entitled to go into the background upon which those opinions were based.

The Court: Overruled.

A. The Pacific Portland Cement Company has no by-products.

Mr. Rosenberg: I did not ask that. I asked you the question, what products do they make?

Mr. Bennett: Counsel has interrupted me on a number of times and in a manner that was rude and ungentlemanly and I do not think counsel

(Testimony of C. Bruce Flick.)

should interrupt a witness with a snarl and a growl. That is not decent conduct and I object to it.

The Court: Proceed orderly, gentlemen.

Mr. Rosenberg: Your Honor, I have permitted the witness to ramble on direct examination.

Mr. Bennett: Oh, you have not permitted anything.

The Court: Proceed. Reframe your question.

Mr. Rosenberg: Q. Will you tell me what products Pacific [270] Portland Cement makes; will you tell me what products they make, whether they are main products or by-products?

A. Pacific Portland Cement Company makes Portland cement, it makes gypsum products, agricultural gypsum, gypsum used as cement retarder, hardwall plaster which is made from gypsum, makes gypsum wallboard. It sells limerock, it sells shell flour, agricultural lime, shell meal, fertilizer, mixed fertilizer. I think that is about it.

Q. When you mentioned gypsum products, what do those embrace?

Mr. Bennett: He has already said—

The Court: You will have to speak more loudly for the Reporter.

Mr. Rosenberg: Q. You mentioned gypsum gypsum products. What does that embrace?

A. Gypsum products include agricultural gypsum, gypsum as cement retarder, hard wall plaster, two or three other items of plaster that I have

(Testimony of C. Bruce Flick.)

not mentioned but they are minor, and gypsum wallboard.

Q. Is each of those products the result of a separate process or do some of them come off production lines that contribute to the production of two or more products?

Mr. Bennett: I object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

Q. You are speaking now only as to gypsum products? [271]

Mr. Rosenberg: Q. Any of your products.

A. I would describe our products as products very definitely of the type of general product or co-products. We have no by-products.

Q. Now, I will ask you the same question again. Do you have any products that you make where the processing is joint up to a point and then there is a separation and the material at the point of separation is separately processed from that point on?

Mr. Bennett: I suppose, your Honor, I need not restate the objections that I wish to make to these questions.

The Court: Overruled.

The Witness: A. You have, for example, gypsum. Gypsum rock is quarried out of a quarry at Gerlach, Nevada. All of the subsequent gypsum products are derived, let us say, from the rock which comes from the quarry, so when the rock is blasted out of the quarry and transported down

(Testimony of C. Bruce Flick.)

from this quarry you have one basic raw material from which you make the gypsum products which I have mentioned. Those are all joint products or co-products.

Mr. Rosenberg: Q. I will ask you the same question the third time. Do you have any products that are taken off your production line at a point and from that point on are separately processed?

A. I think I just answered that. The rock that comes from the quarry is— [272]

Q. Let's get the rock from the quarry. You have that in your plant. A. Yes.

Q. You start using some of it.

A. The first thing you do with the rock is crush it up.

Q. Then what do you do?

A. That depends on what you are going to make out of it from there on.

Q. If you are going to make wallboard, what do you do?

A. If you are going to make wallboard, you crush it up fine and then you calcine it in kettles and make what is called stucco. You drive off some of the moisture in the calcining process. The gypsum we take from the quarry is calcium sulphate with two molecules of water, in chemical combination with it. Even out in a Nevada desert it has a little bit of moisture chemically combined with it, the calcium sulphate, and you calcine it in these kettles and drive off a little bit of this chemically combined water to produce what you call stucco.

(Testimony of C. Bruce Flick.)

Then you ship that stucco to the wallboard plant and make wallboard out of it. [273]

Q. Do you take that crushed gypsum and use it for wallboard or do you use that for some of your other gypsum products, too?

A. You could take the same crushed gypsum, without calcining it, crush it to the desired fineness, put it in 100 pound paper sacks and sell it as agricultural gypsum. I am not betraying any trade secrets. These are commonly known facts.

Mr. Bennett: Thank you, counsel.

The Witness: Agricultural gypsum is simply ground up gypsum which is in its natural state. It is just ground up gypsum, that is all.

Mr. Rosenberg: Q. Is there any other product that you make that you process this ground gypsum in order to arrive at your finished product, other than wallboard?

A. Well, we have hard wall plaster, for example.

Q. Yes.

A. You can take stucco after it has been calcined and you can add some chemicals and you can add—sometimes they have used animal hair or some other type of binder material, depending on the kind of plaster they are making, and make plaster that is used in buildings, homes and offices.

Q. So that if I understand you correctly, you can take this crushed gypsum, and depending upon the product that you want to make, you process it

(Testimony of C. Bruce Flick.)

one way for wallboard and you process it another way for plaster, is that right?

A. That is correct, or you need not process it at all. [274]

Q. Or you can use it for agricultural gypsum?

A. Sure.

Q. In keeping your cost accounts at Pacific, Mr. Flick, what do you do as to this crushing process? Do you keep accurate cost records for your various products?

A. We keep cost records for our products on whatever basis seems to us convenient and desirable for our own corporate purposes. We do not at the present time have a contract which affects other people as to the manner in which we keep our costs. When we did have, we kept a special account for that contract.

Q. Now, may I ask you the same question again? Do you keep cost accounts for your various accounts? A. Certainly.

Q. You do. Now, how do you treat this crushing process as between wallboard and plaster? How do you charge that?

Mr. Bennett: I submit, your Honor, that is purely immaterial. It has no relation to the questions here.

The Court: It may or may not have. I will allow it. The objection will be overruled. You may answer.

The Witness: How do we treat the cost of crushing the rock from the quarry?

(Testimony of C. Bruce Flick.)

Mr. Rosenberg: Q. Yes.

A. We charge the cost of crushing against an account for rock.

Q. Then what do you do with it? How do you decide how much it [275] costs to crush the rock that went into wallboard and how much it costs to crush the rock that went into plaster?

Mr. Bennett: If the Court please, I want to point this out to the Court: Counsel is now dealing with an operation which is not a by-product operation. It is an operation up in Nevada that has to do with only one purpose, the manufacture of gypsum. It is obviously immaterial how they keep their accounts for that particular operation. The question here is what accounts should be kept where a by-product is involved.

The Court: Well, too, we also got into the realm of joint products and co-products.

Mr. Bennett: This witness has testified all their products, and his evidence so far shows there is nothing like a by-product that they manufacture in connection with gypsum. He has also shown the Court that there is a distinct difference between cost accounting for a by-product and cost accounting for a main product or a co-product. In other words, they manufacture gypsum. They take that gypsum and by one process they make wallboard out of it and they also sack it and sell that for agricultural purposes, and they also use it in the manufacture of cement. There is nothing at all so far shown by this witness to be in any sense com-

(Testimony of C. Bruce Flick.)

parable or analogous to this situation of a by-product.

The Court: I allowed you the widest latitude. I am going to do the same with the other side. [276]

(Question read by the Reporter.)

A. All of the rock that is crushed is charged for the cost of crushing.

Mr. Rosenberg: Q. Of what?

A. The cost of crushing, so that no matter whether a ton of rock is used for one purpose or another purpose, if that ton of rock has come from the quarry and has been crushed, it is charged with the crushing costs.

Q. In other words, you do not get into your cost of producing wallboard, for instance, the cost of crushing the gypsum that goes into the wallboard. A. Certainly you do.

Q. How do you get it in there?

A. You start out with the rock in the quarry which you are going to use in one of four purposes: You do not know up to that time what you are going to use it for, so it goes through the crushing. You find out then you have a cost per ton of crushed rock. Now, you can use that rock for any one of four purposes, and you charge it to whatever account you use it for at its crushed cost.

Q. You add the crushing to the cost of the rock, is that it? A. That is right, sure.

Q. In arriving at your ultimate cost of your various products, do you include overhead?

A. You have to define what you mean by overhead. [277]

(Testimony of C. Bruce Flick.)

Q. Well, you have been using the term. I will let you define it. How do you define it?

A. Well, I will say in the first place that we operate—we are talking now about a gypsum plant at Gerlach, Nevada, and we are talking about products which I have stated are joint products or co-products. They are not by-products, and the accounting method that we use is correct for joint products or co-products.

Mr. Rosenberg: If your Honor please—

The Witness: I had to make that explanation because any accountant has a different basis for accounting for joint products than he has for accounting for by-products. You are getting me to describe my accounting methods for joint products.

Mr. Rosenberg: Q. Mr. Flick, I do not know whether you know what my purpose is. I am just asking you to answer a simple question and that is whether or not in determining your costs of the various items that you manufacture, do you include overhead?

A. We include—I don't know what you mean by overhead yet, but I will say it this way:

Q. Now, wait a minute. I will withdraw the question. Will you define for me the term "overhead" as you have been using it in your testimony?

A. I have been using it in my testimony as defined in the Westvaco accounts. [278]

Q. To include what?

(Testimony of C. Bruce Flick.)

A. It happens some items of overhead are considered as overhead by Westvaco which are not considered as overhead by Pacific.

Q. Oh, no. I am talking about the testimony that you gave as an expert when you were talking about pineapples and peach seeds, and you said that overhead would not be included in the cost of production of those articles. I am asking you now to define overhead as you used it in giving that testimony regarding the pineapples and the peach seeds and the dust from your plant.

A. I will give you a general definition of overhead without reference to the overhead of our Gerlach plant. Is that what you desire?

Q. I want you to give me a definition of overhead as you used it in your testimony when you said, as an abstract proposition, it is not an item to be included in determining the cost of production of a by-product. Now, you tell me what you meant when you gave that testimony.

A. What you mean by overhead, what any accountant means by overhead, are costs which you would describe as the general and administrative costs of carrying on a business operation as distinguished from costs of production or as distinguished from cost of selling. General and administrative costs constitute overhead. That includes, let us say, the cost of the general [279] management. If I may illustrate, the cost of the president's salary would be a typical overhead. The cost of the secretary and treasurer's salaries would be a typical overhead. Legal expense, the fees you pay your attorneys

(Testimony of C. Bruce Flick.)

would be a typical overhead. The cost of auditing, fees for your public accountants is an overhead. Cost of telephones and telegraphs, the cost of subscriptions and donations, the cost of a personnel department, the cost of a purchasing department, the cost of the traffic department might be considered overhead, the cost of your credit manager is customarily part of your overhead, your general corporation taxes might be considered overhead—all of those general and administrative expenses which the accountant considers in a different category from expenses which are cost of production or cost of selling. Cost of bookkeeping is a part of cost overhead.

Q. And if it is a business that has a head office and branch offices, a certain part of the head office expense would be considered as overhead, would it?

A. No.

Q. What would you include that in?

A. General and administrative.

Q. I thought you said that that was part of overhead.

A. Well, excuse me. Perhaps I did not quite understand it. When you have a head office which administers a number of different plants, that head office is general overhead of the [280] business and not overhead of a particular plant.

Q. And is that customary to allocate a portion of that overhead to the various plants that comprise the whole?

A. I don't believe so.

Q. You do not believe so. Have you give us your best definition of overhead expense?

(Testimony of C. Bruce Flick.)

A. I think that covers the definition quite well.

Q. Using the term as you just defined it, will you tell me whether or not Pacific in its own accounting includes in determining the cost of producing its various items, overhead expense?

A. Pacific in determining the cost of its various items—again I can't help but say this because it influences your statement of what is good accounting—Pacific is producing joint products and not by-products. In accounting for its joint products, Pacific includes in the cost of the product at a particular plant—let us take the Gerlach, Nevada gypsum plant as an illustration—includes in the cost of the products at the Gerlach plant the so-called overhead items at the Gerlach plant. Pacific does not allocate to the Gerlach plant any portion of the overhead from any other plant nor from Pacific's head office in San Francisco.

Q. But you do include in determining your costs of production of articles from that plant, the overhead expenses as you have defined them of that plant, is that right? [281]

A. At that particular plant, those overhead expenses which are definitely incurred at that plant.

Q. How many different items do you make at that plant?

A. I think I enumerated four, didn't I? Agricultural gypsum, hard wall plaster, stucco, gypsum for cement retarder.

Mr. Bennett: May I interrupt a minute, your Honor? I am a little confused. I thought the wit-

(Testimony of C. Bruce Flick.)

ness was talking about the Gerlach plant. Now apparently I am wrong in that. He is talking about some other plant because, as I understood it, there was only one product produced at the Gerlach plant and that was the gypsum itself. Maybe I am wrong.

The Court: Read back, Mr. Reporter, if there is any question about it.

The Witness: No, there are four products, four major products.

Mr. Bennett: Q. Produced at Gerlach?

A. Yes.

Mr. Bennett: Then I was mistaken, your Honor. I thank you very much, and thank you, counsel, for permitting this interruption.

Mr. Rosenberg: Q. Of course, as between those four products you can not accurately determine how much of the overhead is directly attributable to the production of each of the four products that you make there, can you? For instance, the salary of the plant superintendent, is that one of the items [282] in the overhead expense?

A. That is right.

Q. You do not know how much of his time he devotes to each of the four products that you make there, do you? A. No.

Q. So how do you decide how much of his salary you are going to charge to each of the four items that you make there? You allocate it, don't you? A. Yes.

(Testimony of C. Bruce Flick.)

Q. Yes. Sure, and what do you use as your basis of allocation?

A. I think at the Gerlach plant we use a labor basis.

Q. A labor basis? A. Yes.

Q. So you are not very surprised when you see the Westvaco Company using a labor basis as a means of allocating overhead, are you?

A. I have to repeat, we have no by-product at our Gerlach plant.

Q. Will you please define the term by-product to me as you have been using it in your testimony?

Mr. Bennett: I do not think that is necessary because this contract, your Honor, states on its face that this is a by-product.

Mr. Rosenberg: This contract was not drawn by accountants. It may have one meaning for one person and to an accountant it [283] may mean something entirely different.

Mr. Bennett: All right. I withdraw the objection.

Mr. Rosenberg: Q. Will you please define the term by-product for me as you have used it in your testimony?

A. The term "by-product" means a product which is produced as an incidental product, as a result of reclaiming a waste or as an incidental result of the removal of impurities, let us say, from a major product or purely incidental to the production of a major product. In other words, in an industrial operation you set out with the product

(Testimony of C. Bruce Flick.)

of producing a certain object, and incidentally you can't help producing a by-product. It may be the hull from the pineapple or it may be the pit from the peach, to use those examples, or it may be the sulphates from the production of magnesium oxide.

Q. What is the measure which controls the determination as to whether a particular product is incidental or not and therefore is a by-product?

A. Well, we have to consider the particular circumstances in any case. Generally the characteristic, I think, would be that your by-products may be of two types: One type, it may be something that you are able to sell and get something out of it without doing anything to it. Another typical example of a by-product is a waste material that you have to process before you can sell it for any value. You do not build your plant to produce the by-product. You build your plant to produce the main product, and in the course of that production you just get this material, this by-product material.

Q. And if you build the plant for the purpose of producing two products, would that necessarily control your determination as to whether one is the main product, or one is the by-product?

A. Very definitely. Our Gerlack plant was built to produce joint products or co-products. It was built equally to produce agricultural gypsum, some gypsum for cement retarder, hard wall plaster. The joint products are all made out of the same raw material.

(Testimony of C. Bruce Flick.)

Q. Of course, will you concede this, Mr. Flick, that a product that starts as a by-product may get to be a main product or a joint product, isn't that true?

A. How do you mean that may get to be a main product?

Q. It may assume major proportions.

A. How do you mean it may assume major proportions? In terms of dollar value?

Q. Important to the person who is making it. Would you consider gasoline or kerosene a by-product?

A. It all depends on how those things are made. I am not very familiar with the manufacture of kerosene.

Q. Would you consider tomato juice a by-product, the way it is being made today?

A. Let me understand your question again. What you mean to say is if a certain product starts out as a by-product, that that product may become in future years economically so valuable somebody [285] might build a plant just to produce that item. In that case, it is no longer a by-product.

Q. Let us say you start making the product and you have a plant for it, but the importance of the production and sale of that product economically to the maker increases in such a degree that it becomes a matter of major importance to him, and he either enlarges his plant or produces it in the same plant; would you say that that changes its category as a by-product?

(Testimony of C. Bruce Flick.)

Mr. Bennett: If your Honor please, I think we are getting into the realm of speculation. The situation is in no way analogous to this case.

The Court: We have been from the quarry up to the peach factory.

Mr. Bennett: The point I wanted to make, your Honor, is that here we have an admitted by-product. The contract states that. Secondly, the situation, so far as its importance is concerned, has not changed a bit since the contract was executed. The only difference is the defendants claim that there are increases in the cost of production, some part of which we are willing to admit occurred.

The Court: Read the question, Mr. Reporter.

(The last question was read by the reporter.)

The Witness: A mere change in economic value I do not think would change the character of a by-product as a by-product. [286] Now, let us assume here we have a magnesium oxide, the major product, worth around \$46 a ton, and the by-product, gypsum, worth around, say, \$4.36, claimed price a ton—

Mr. Rosenberg: Q. Now, wait a minute.

A. We might assume—I am trying to trace your example. We might assume gypsum becomes worth \$46 a ton and that magnesium oxide declines in value and becomes worth \$4.36 a ton, and you are asking me whether under such circumstances the gypsum would not longer be a by-product.

(Testimony of C. Bruce Flick.)

Q. That is it. What would you say to that?

A. Well, I would say that the by-product nature of the gypsum would still persist, because it still was produced by the removal of impurities from the material out of which the original major product was made.

Q. And you would continue, for accounting purposes, to treat it as a by-product, would you?

A. We have a 25-year contract which says it is a by-product.

Q. I am not talking about this contract. This is objective testimony, now. Just forget about this contract. You are testifying as an expert. Would you still continue to treat it as a by-product under the hypothesis you have just stated for accounting purposes?

A. Do you mean if I had been treating it all the years during which the change in value had occurred?

Q. You may assume that, also. [287]

A. Well, you might have a problem based upon financial considerations and other considerations. It is hard to imagine a hypothetical situation. Again, whether you have a by-product depends upon what your main purpose in having your plant is. If your main purpose is to produce a major product, that is your major product, and if incidental to that you get this by-product, it is a by-product.

Q. But can't you conceive, Mr. Flick, that you can start a chemical plant with a main product and

(Testimony of C. Bruce Flick.)

minor products without necessarily treating them for accounting purposes as by-products?

A. Whether you have major products and minor products depends upon the relative importance of joint products, and a minor product is not a by-product. Now, for example, if at our Gerlach plant we had a tremendous business in hardwall plaster and a very small business in agricultural gypsum, the agricultural gypsum would be a minor product, but it would not be a by-product.

Q. Let me ask you if you will tell me how you distinguish between a by-product and a joint product? What is your distinction in that respect?

A. I tried to explain that. I will do it again.

Mr. Bennett: It has been asked and answered.

The Court: You may answer.

The Witness: How do I distinguish between a joint product and a by-product? [288]

Mr. Rosenberg: Q. That is right.

A. Joint products are products which are produced from the same raw material, and are of, you might say, equal importance in the plant. Our Gerlach, Nevada, plant is a typical example of joint products. None of those products is produced as a result, let us say, of removing impurities from the others. None of those products is produced incidentally to the production of the other products. They are produced deliberately and on purpose, and we can stop the production of one without having any influence on the production of the others. But when you have a by-product, as this

(Testimony of C. Bruce Flick.)

by-product gypsum, you can't make the main product without removing the sulphate impurities. You can go on and make the main product and dump the by-product material in the bay, as was done for two weeks in September, 1946. You see, the characteristic of the by-product is it is something that comes off first as a waste material, or as a removal of an impurity. It is something that you cannot hardly help producing incidental to the production of the main material. But where you have joint products, as at Gerlach, we bring the rock down from the quarry and we can make anything we please out of that rock. No one product—the plaster is not produced by removing impurities from the agricultural gypsum, or vice versa. You can produce agricultural gypsum without producing gypsum for cement retarder. You can produce plaster without producing stucco for making wallboard. Don't [289] you see, you can make four joint products out of your initial raw material and they are not related in their production in the way that a by-product is related to the production of the major product.

Q. Let us see if I understand you correctly, then, Mr. Flick: If I understand you correctly, the thing that controls your determination as to whether an item is a by-product or a joint product is whether or not you can continue making another product and either make the product in question, or not, isn't that it? Is that what controls your determination?

(Testimony of C. Bruce Flick.)

Mr. Bennett: Could I have that question read?

Mr. Rosenberg: I would rather not have that question read, that was so terrible.

The Court: Reframe your question.

Mr. Rosenberg: Q. Do I understand, then, that the thing that controls your determination as to whether or not a product is a by-product or a joint product is as to whether or not you could continue making another product in the plant out of the same raw material, and either make or not make the first product, as you see fit? Does that correctly state your position?

A. Well, the characteristic, again, of the by-product, is that it is a product which comes off incidental to the production of the main product, and it is characteristic of a by-product that the by-product material has no value at the point of separation. [290] You have got to do something to it to give it market value, and you go on producing the main product. You still have to remove these impurities or get rid of this waste, but you go on producing your main product. Now, if you have two joint products, a joint product is very well exemplified in the pineapple industry. You have your by-product. The shells that you take off the pineapple come into bran. You have as joint products sliced pineapple, crushed pineapple, pineapple juice. Do you see the distinction I am trying to make? Joint products you make out of your major material. Your by-product is basically a

(Testimony of C. Bruce Flick.)

waste you get rid of. You are able to process it and get something out of it.

Q. And in the pineapple case you can make only one or two of those ultimate products without making the third, isn't that true?

A. You mean you could make the canned fruit without making the pineapple bran?

Q. Surely.

A. Surely, you could throw the waste away. You would not have to make something out of it.

The Court: It is time for adjournment.

(Thereupon an adjournment was taken until tomorrow, Friday, December 12, 1947, at ten o'clock a.m.) [291]

Friday, December 12, 1947, 10:00 o'clock a.m.

The Court: You may proceed.

C. BRUCE FLICK

resumed the stand.

Cross Examination—(Continued)

Mr. Rosenberg: Q. Now, Mr. Flick, if I understand your testimony correctly, your conclusions that it is improper to charge overhead and indirect charges to the cost of producing gypsum is based upon your conclusion that gypsum is a by-product, is that right?

A. Gypsum is a by-product and under the contract that we are concerned with, we have the term "actual advance in cost of manufacture," which involves the comparison of two twelve month periods.

(Testimony of C. Bruce Flick.)

Q. What does that comparison of two twelve month periods have to do with the question as to whether in two twelve month periods you include overhead and indirect charges?

A. It has a very great deal to do with it because in order to determine the actual advance you have to find out whether the apparent bookkeeping advance is in fact an actual advance and not merely a hypothetical advance based on some assumed bases of allocation.

Q. That goes to the propriety of the allocation rather than to the propriety of the inclusion as a general principle, doesn't it? [292]

A. It goes to the propriety of allocating indirect items to the cost of manufacture of a by-product first. Second, you have got that comparison, which you must always keep in mind in connection with this contract.

Let me say this: Charges which would be perfectly admissible as direct charges may under some circumstances distort the comparison of the two twelve months periods so as to produce a bookkeeping result which is not an actual advance. For example, I have stated that in my opinion it is perfectly admissible to charge to the cost of manufacture of the by-product gypsum the cost of repairing the machinery by which you dry and grind and ship the gypsum. If in one twelve month period there was a deliberate, very large amount of repair work done, wherein the preceding twelve month period there was practically no repair work done,

(Testimony of C. Bruce Flick.)

the comparison between the two periods would show a substantial advance in the cost of manufacture of the gypsum, which would not be an actual advance in the cost of manufacture, but merely a rigging of the charges between the two twelve month periods.

Now, let me clear this up. I am not implying for a moment that there has been any such thing. I am merely pointing out as an abstraction the importance of keeping in mind always that we are concerned with the comparison of two twelve month periods.

Q. You are mentioning repair labor. Do you consider that an [293] overhead charge or an indirect charge?

A. No, I consider repair labor—

Mr. Rosenberg: Just a moment—

The Witness (Continuing): —repair labor—

Mr. Rosenberg: Q. Do you consider that an overhead charge or an indirect charge?

A. No, I consider repair labor of machinery in the gypsum department, actually repairing, drying and grinding machinery a direct charge.

Q. Maybe I do not make my questions clear, Mr. Flick. That has nothing to do with overhead or indirect charges, has it, the direct labor charges?

A. It has to do with the comparison of the twelve month period and you can not ever forget that, no matter whether you are talking about overhead or direct charges or what you are talking about.

(Testimony of C. Bruce Flick.)

Q. But what I am trying to find out from you is this: Am I true in saying, in the first place, that you concede as a general principle of accounting that in determining the cost of producing a manufactured article—and we will eliminate now and consideration of a by-product—that it is proper to include in your cost of production the overhead charges that are properly allocated to that article? Will you concede that?

Mr. Bennett: Just a moment, your Honor. I object to that question as wholly irrelevant and immaterial. We are dealing [294] here with a by-product, and whether or not it is a by-product is something that the defendants are foreclosed to assert because the contract specifically says it is a by-product incidental to the manufacture of their primary products. Now, if counsel are seeking to prove for your Honor that this is not a by-product, then certainly they are seeking to change specifically the express and explicit language of the contract. There is no question, there can not be any question in your Honor's mind, so far as this contract is concerned, and so far as the function of the Court is involved in determining or interpreting these terms "cost of production" or "actual advance in cost of manufacture" that the product involved is a by-product because the contract specifically states it is, and so far as accounting principles are concerned, we are entitled to proceed upon that assumption. Whether or not any factors have intervened to change the character of that

(Testimony of C. Bruce Flick.)

problem is wholly immaterial because the contract governs.

Mr. Rosenberg: If your Honor please—

The Court: You have divorced this so-called by-product out of your question entirely, have you not?

Mr. Rosenberg: Yes, for this simple reason, that whether or not is a by-product or it is not a by-product, it is our contention, makes no difference for the purpose of determining the proper accounting methods. Now, this witness has given a lot of testimony in which he stated that he felt it was improper [295] to include overhead and indirect charges in the cost of producing this product, whether it is a by-product or a co-product, purely on the basis that it is a by-product.

The Court: Read the question, Mr. Reporter.

(Question read.)

Mr. Bennett: Before your Honor rules, may I be heard?

The Court: I interrupted counsel. He has not had an opportunity to be heard.

(Question reread.)

The Court: The objection is overruled. I am prepared to let the witness answer it. He may answer the question.

The Witness: In answering the question now, we are not talking about a by-product.

Mr. Rosenberg: Q. No.

A. Your question specifically eliminated the question of a by-product.

(Testimony of C. Bruce Flick.)

Q. That is true.

A. So we are talking about joint products or co-products or just one product.

Q. That is right.

A. Now, the cost of production is composed of the direct cost for labor and material and supplies and all those things. Where you are concerned with actual cost of production, you do your best to find out what the actual costs are and you allocate as little as possible or nothing. Now, you will find accountants [296] who are "allocation happy," if you want to call them that. They want to allocate everything clear on up to the president's salary, but there is a definite difference between cost of manufacture and general and administrative expense and general overhead and selling expense and these other things.

Q. Mr. Flick, you remember your own definition of overhead that you gave yesterday?

A. I think I remember it in general.

Q. All right. What I am trying to have you tell me is whether or not you concede that overhead expense, as you yourself define it, and again eliminating any consideration of a by-product, whether that overhead expense, in accordance with good accounting practice, is a companion factor in the aggregate cost of producing the article. Now, is that true or isn't it true?

Mr. Bennett: I suppose my objection runs to this line, your Honor.

(Testimony of C. Bruce Flick.)

The Court: Yes. Answer. Do you wish the question read?

The Witness: I think I understand it. The question is whether overhead expense is properly includable in cost of manufacture.

Mr. Rosenberg: Q. That is right.

A. Well, again, if you make hypothetical, theoretical allocations of overhead expense to cost of manufacture, they may be on the books but they are not actually a part of the cost of manufacture. And, as I say, you can find accountants who are [297] allocation happy and who will allocate everything on up to the president's salary, but there is a place where you should stop. The cost of manufacture means cost of making something. It does not mean the cost of telephoning to somebody you are going to sell it to or anything of that sort, or the cost of legal expense to have litigation over a contract.

Q. Mr. Flick, you included president's salary in overhead expense in your definition yesterday, didn't you?

A. I included president's salary as overhead expense, and I am denying it should be included in cost of manufacture.

Q. All right. I am asking you if you included that in overhead.

A. The president's salary?

Q. Yes.

A. That is general and administrative overhead expense.

(Testimony of C. Bruce Flick.)

Q. I am asking you as an accountant whether or not in determining the cost of producing a manufactured article, it is common practice to include overhead expense in such costs. Can't you answer that yes or no?

A. It is not good accounting practice to include the president's salary in the cost of manufacture.

Q. Didn't you tell me yesterday in your own accounting system that Pacific Portland Cement Company you include overhead expense in determining the cost of the various products that you manufacture? [298]

A. We were talking, Mr. Rosenberg, about one particular plant of the Pacific Portland Cement Company, which was the Gerlach, Nevada plant.

Q. All right. I will confine my question to that.

A. We do not charge any part of the president's salary or the secretary and treasurer's salary or the credit manager's salary or any of those overhead salaries. We do not charge any part of those salaries to the Gerlach plant.

Q. Your overhead account, whatever it comprises—and you mentioned at least eight or ten difference items that it comprised—you do include overhead expense in determining the cost of producing the various items that you produce in that plant, do you not?

A. I do not believe we include any one of the overhead items that I mentioned yesterday.

Q. What do you include?

(Testimony of C. Bruce Flick.)

A. We include at our Gerlach plant—and again at Gerlach we have joint products and not by-products—we include the cost at that plant.

Q. Of what?

A. Of the labor, materials, the supplies, the repairs—

Q. I am talking about overhead, Mr. Flick.

A. The plant superintendent.

Q. What else?

A. The taxes on that plant. [299]

Q. Yes.

A. The workmen's compensation insurance, the social security taxes, both of which I have mentioned as direct charges, the property taxes on the plant, anything which is at that plant.

Q. Telephone and telegraph? A. No.

Q. Where do you put that?

A. I am quite sure that is paid in San Francisco and charged in our general overhead.

Q. How about bookkeeping? Do you have any bookkeeping there?

A. We have at the plant one timekeeper to keep the actual time charges of the men and we have a storeskeeper to record the actual issuances of materials and supplies and we have a man we call a chief clerk, who actually spends most of his time arranging for freight cars to take the stuff away and that sort of thing.

Q. Does that go into general overhead?

A. No, that is charged at Gerlach and apportioned among those joint products.

(Testimony of C. Bruce Flick.)

Q. I say as overhead of that plant?

A. At that plant, yes.

Q. As overhead?

A. Well, I don't know—

Q. How do you allocate it?

A. I don't know that we call it overhead. I told you it was [300] spread, the expenses are spread to the products at that plant, which are joint products. Now, the overhead is mostly at San Francisco and is not charged in any account to the Gerlach plant.

Q. Let me put it this way: Mr. Flick, you have a number of expenses at that plant that are indirect in the sense that you can not charge them directly to the various products that you make in the plant, isn't that true? Well, your plant superintendent. You told me yesterday you do not keep track of how much of his time he devotes to each of the separate products there, so that is allocated among those products?

A. That is true, and that superintendent has no function except supervision.

Q. But you do have a number of expenses at the plant that you can not charge to the various products that you manufacture, do you not?

Mr. Bennett: I do not understand that question. It is ambiguous and uncertain.

Mr. Rosenberg: I will withdraw that question. I will put this question and then I will leave the subject:

Q. Is it your opinion as an expert accountant that in determining the cost of producing manu-

(Testimony of C. Bruce Flick.)

factured products that it is not in accordance with good accounting to include as an element of the cost of manufacture overhead expense properly and fairly allocated to the product? [301]

A. Properly and fairly allocated.

Mr. Bennett: I did not get that answer.

The Court: Read the question and answer, Mr. Reporter.

The Witness: I was pausing on that term.

(Question and answer read.)

Mr. Bennett: Your Honor, in addition to the objection that runs to this line of inquiry, I wish to add the further objection that it injects the hypothetical situation and a conclusion, fairly and reasonably, or words to that effect.

Mr. Rosenberg: I will say if the amount allocated is allocated by methods and means that are fair and reasonable and in accordance with good accounting practice.

The Witness: That would be for the accountant to have to judge in each case based upon the circumstances, whether in his opinion as an accountant it would be fair and reasonable.

Q. (Mr. Rosenberg): I am speaking only about the method of allocation, Mr. Flick. Let me reframe the question. I am asking you now as an expert accountant whether or not it is an accepted practice and in accordance with good accounting practice in determining the cost of producing a manufactured article to include as an element of

(Testimony of C. Bruce Flick.)

that cost the overhead of the plant in which that article is made?

A. And your article again refers to an article which is not a byproduct?

Q. That is true. [302]

A. An article which is not a byproduct. Is it proper to include in the cost of manufacture overhead, an apportionment of overhead. Again, as I indicated before, you have got to determine what you mean by overhead. Overhead is a pretty broad term and goes all the way up to the top. Now, if you take a plant such as our Gerlach, Nevada plant, we by our own practice allocate the overhead at that particular plant, and those particular types of overhead, and considering the function of the men who are included in the overhead at that plant, we allocate that to the products produced at that plant.

Q. That is right.

A. But we have many types of overhead which are not allocated to that plant at all. We do not allocate a nickel from our San Francisco office.

Q. (The Court): If I followed your testimony, you indicated you were producing four major articles.

A. Yes, sir.

Q. Now, how is the overhead applied to those four, for example?

A. We apply the overhead to the different departments in the plant based upon the percentage of labor payroll in those departments. And, of course, some departments function, you might say,

(Testimony of C. Bruce Flick.)

for all four products. For example, the crushing machinery, when the rock comes down from the quarry, you crush it up.

Q. But you allocate overhead to each one of those? [303]

A. Yes.

Q. (Mr. Rosenberg): Are your accounting practices the same in your Redwood City plant as they are at Gerlach with reference to overhead?

A. Yes.

Q. Exactly the same? A. Yes.

Q. Now, the question I first asked you, and I do not know whether you understood it or not, is this: In arriving at your conclusions that you have expressed throughout your testimony that overhead expense is not a proper item in the cost of producing gypsum in the Newark plant of the Westvaco Chlorine Products Company, have your conclusions been based upon what you conceive to be good accounting practices as a general proposition or have they been based upon what influenced or based upon what you conceive to be the meaning of the contract? [304]

Mr. Bennett: Well, your Honor——

Mr. Rosenberg: I want to know whether the witness is stating as an abstract proposition that overhead expense is not a proper factor to include in the cost of producing a by-product, or whether his conclusions that he expressed on the witness stand have been influenced by what he conceives to be the effect of the contract that the parties entered into.

(Testimony of C. Bruce Flick.)

Mr. Bennett: I think that is confusing and ambiguous.

The Court: I don't think we would be here only the witness on the stand examined the contract. While there is no testimony in that regard, it doesn't seem to be in doubt. Read the question, Mr. Reporter.

(The question was read.)

Mr. Bennett: I will add to the question that the objection is confusing and uncertain, and the further objection is that the witness has answered it I don't know how many times.

The Court: He may answer. I will allow him to answer.

A. (The Witness): It is my opinion that the allocations of those items included in overhead at the Newark plant, allocations of those items to by-product gypsum are not properly includable as cost of manufacture of the by-product gypsum. May I read from their accounting schedule the items which made up the overhead? Overhead is an awfully broad term. If I can be less general and more specific——

Mr. Rosenberg: Well, I wish he would first answer the [305] question and then explain.

Mr. Bennett: He answered it.

Mr. Rosenberg: Why don't you let me make a statement without interrupting me, Mr. Bennett?

Mr. Bennett: I beg your pardon. I did interrupt.

The Court: The objection goes to the point you

(Testimony of C. Bruce Flick.)

have not answered his question. You can answer the question and then you may make an explanation.

The Witness: I would say first that the overhead at Newark is not, in my opinion, properly to be allocated to the cost of manufacture of the by-product gypsum, and I would like to explain—

The Court: You may.

The Witness: By reading the elements which compose the overhead, because we can very easily be misled by broad generalities and terms like overhead. The accountant should deal with facts and not with general terms. Let me read the list of items.

Mr. Rosenberg: Well, I still ask the witness whether or not his conclusion would be based upon what he conceives to be good accounting practice for a by-product, or whether his conclusions and opinions are influenced by what he conceives to be the meaning of the contract that the parties entered into.

The Court: You may answer.

The Witness: I will have to stop a minute and straighten [306] out my motives and psychology now, won't I? I believe my answer reflects my opinion as to what is good accounting practice in these particular circumstances, and I think I have already testified as to what I considered good accounting practice under the contract.

Q. (Mr. Rosenberg): When you say your opinions have been based on what you consider to be

(Testimony of C. Bruce Flick.)

good accounting practice, under the circumstances, do you include in the circumstances the fact that the parties entered into this particular contract?

The Court: In effect he so testified. If not, answer the question.

The Witness: I include particularly in the circumstances the facts of production as I understand them, because an accountant must have some understanding of the facts of production before he can judge the accounting records which purport to reflect and record the facts of production, and the facts of production, as I understand them here, are that this gypsum is in effect a removal of an impurity from the product which has to go on to be manufactured into magnesium oxide; you get the sulphates out, you precipitate, filter out the gypsum. So, as I understand the facts of production, regardless of the contract, itself—if I may read these overhead items, I could answer your question much better.

The Court: Did we not go over those items on direct examination? [307]

Mr. Rosenberg: Yes; I think we did.

Q. I want to find out whether his opinions are based upon what he conceives to be a good accounting practice for a by-product, or whether he is basing his conclusions upon the fact that he believes that under this contract only direct charges were entitled to be included. I still want the question answered.

Mr. Bennett: I think he answered.

(Testimony of C. Bruce Flick.)

The Court: Yes.

Mr. Bennett: He said it was based——

The Court: Let's clear it up. Answer the question.

The Witness: It is difficult, in my opinion, to get away from some of these considerations because they are part of the facts you consider. Good accounting practice for a by-product in the comparison of two twelve-month periods. You might change your account method from one period to the next. You might say this year I have discovered last year's method was not so good, so this year I will do it right. Then in comparing the two to get the price the product should be increased, it is not an actual advance in cost of manufacture, that is a question of accounting as well as a question under the contract. Any accountant knows that good accounting practice is if you compare two twelve-month periods you have got to have the same accounting methods consistently or you don't get a true comparison, you get a bookkeeping comparison, or a theoretical comparison. [308]

Mr. Bennett: Counsel if that is not clear, I would like to ask a question, a further question. I don't want to have the matter passed without comment. That answers the question. Do I understand your purpose in the questioning of the witness is whether his statement as to proper accounting methods for a by-product would have been the same as he has given here, even though this contract was not made here? Is that what you mean?

(Testimony of C. Bruce Flick.)

Mr. Rosenberg: That's right.

Q. I understood his testimony yesterday, testifying as an expert and as an abstract proposition when he was referring to pineapples and peach seeds, and things of that sort, that he stated as an abstract proposition that it is not proper to include the cost of manufacture overhead expense. Is that correct? Let me ask the witness, is that a correct statement, is that your expert opinion?

A. As a part of the cost of manufacture of a by-product, and again I have to qualify it because when you say "overhead" I don't know what you mean.

Q. I asked you yesterday to define the term as you used it in your testimony, and you are using it in the same sense now.

A. As I used the term, in my opinion it is not properly allocable on a hypothetical basis to the cost of production of a by-product.

Mr. Bennett: I think that answers the question. [309]

Q. (Mr. Rosenberg): If you will just explain what you mean by a hypothetical basis, I don't understand that.

A. A typical example of a hypothetical basis is the assumption that the percentage of labor payroll is related to all the elements of overhead which are allocated, on such a basis it is a pure arbitrary hypothetical matter, or an assumption.

Q. Well, it is arbitrary. A. Right.

(Testimony of C. Bruce Flick.)

Q. But it is a basis of allocation that is very commonly used, and which you, yourself, use in your Gerlach plant?

A. We use it for our joint products at Gerlach, yes.

Q. I show you a letter of October 2, 1941, which is Plaintiff's Exhibit 1 here. You have testified that shortly after you went into the employ of Pacific Portland Cement Company you went into Mr. Canvin's files, and among other things you found that letter.

A. That is correct. I became controller in June of 1943, and as the controller it was probably about that time, or shortly after that I took a look at this contract and the files connected with it, and I found this letter from Mr. Hurlbert with these figures.

Q. You read the letter and you inspected the sheet that was attached? A. Yes.

Q. Which purports to show the gypsum manufacturing cost for [310] the years July, 1930, to June, 1940, as compared to July, 1940 to June, 1941? A. Yes.

Q. You knew that the price of gypsum under the contract had been increased 18 cents as a result of an increase that occurred prior to the time you went into the employ of the company?

A. That is correct.

Q. The statement accounted for 15 cents of the 18-cent increase? A. That is correct.

Q. You read the letter, did you?

(Testimony of C. Bruce Flick.)

A. Yes.

Q. You read the part which says, "If you desire further information in re the attached statement, or in connection with a basis of determining increase in cost please call the writer." You read that?

A. Yes, that is correct.

Q. Did you make any inquiry as to what the other three cents of that increase was composed of?

A. I made no inquiry of Westvaco. I discussed the letter with Mr. Canvin in June of 1943.

Q. But, at any rate, you, as controller, never inquired at that time of Westvaco to ascertain what the balance of the 3-cent increase was composed of?

A. At that time, as controller, I made no inquiry of Westvaco because my understanding was that the direct charges were [311] the charges I was to be concerned with under the contract. That was my job as controller, to find out what I was supposed to concern myself with under the contract.

Q. You mentioned a conversation that you had with Wallace and Mr. Cuneo, I believe you said, on January 14, 1944; do you recall that?

A. Yes.

Q. That was at the time that you were informed that Westvaco was claiming to notify you of an additional 78-cent increase in the cost of production of gypsum that would result in a price of \$3.76 per ton?

(Testimony of C. Bruce Flick.)

A. That is correct; January 14th was the date when we went down there to look at the details.

Q. So you and Mr. Canvin——

A. Yes.

Q. And your Mr. Riddell?

A. Yes, our chemical engineer.

Q. You went there and spent some time with Mr. Wallace, Mr. Cuneo, going over the figures relating to this price increase?

A. Correct. On that occasion we spent one day.

Q. I believe you said that it was not your function to go over there and argue with anybody, so you did not raise any objection at the time of the conference?

A. That is correct. At that time I was controller, and my only function on that trip was to get information. [312]

Q. Then shortly after that conference do you remember that you wrote a letter asking for some detailed information with reference to this price increase? A. Yes.

(Recess.)

Q. (Mr. Rosenberg): Mr. Flick, I will show you what purports to be a copy of a letter dated January 29, 1944 written to Pacific Portland Cement Company, to your attention, signed by Westvaco Chlorine Products Corporation, by Vernon E. Cuneo, plant office manager, and ask you if you recall receiving the original of that letter (handing document to witness).

A. Yes, I recall receiving this.

(Testimony of C. Bruce Flick.)

Q. And the enclosures that are attached to it?

A. Yes.

Mr. Rosenberg: I will offer that in evidence, if the Court please.

The Court: Let it be admitted and marked.

Mr. Bennett: You are offering that for the purpose, I presume, of cross examination and not to establish the truth or accuracy of the actual or the existence of those costs, are you, Mr. Rosenberg?

Mr. Rosenberg: I am offering it for the same purpose that you offered Mr. Flick's letter of November 4, 1946, Mr. Bennett, and that is to show the course of relations between the parties relating to this contract.

Mr. Bennett: Yes, and not as evidence of the actual existence of these costs nor the propriety of the costs, is that correct?

Mr. Rosenberg: No, I won't limit myself. Attached to [313] this letter if the Court please, are two cost sheets furnished at the request of the plaintiff showing the cost of production of gypsum from July, 1939 through June, 1940 and July, 1940 through June, 1941, which is the period covered by the 18 cent increase and for the calendar year 1942 and the calendar year 1943, which is the period on which the 78 cent increase or the \$3.76 price was based.

Mr. Bennett: Your Honor, I have no objection to the offer of this letter in evidence for the purposes first stated by counsel, but I do object to it as any proof or evidence of the validity or genuine-

(Testimony of C. Bruce Flick.)

we understood you to say that the same accounting principles and procedure have been followed since the inception of operations under the contract. Naturally, this is an important point and we shall appreciate it if you will put in writing the description of the accounting basis for each classification of cost and state whether it has been consistently followed since the inception of the contract.

“2. The classification of costs for which you gave us figures for 1942 and 1943 included the following:

“Operating labor, repair labor, operating materials and supplies, repair materials and supplies, fuel oil, gas, power, workmen’s compensation insurance and social security taxes, water, depreciation, insurance, taxes (real and personal property), laboratory, process control and research, [316] general plant expense, engineering and maintenance supervision, purchasing and stores, accounting, overhead, bittern.

“Please give us the figures for each of these items for the twelve months July 1, 1939, to June 30, 1940, and the twelve months July 1, 1940, to June 30, 1941. Mr. O. J. Hurlbert, then your chief accountant, wrote us a letter on October 2, 1941, giving the figures for labor, materials, and power, but we do not have in our files any other detail and shall appreciate it if you will give us the complete set of figures supporting the increase of 18c per ton which went into effect October 5, 1941.

•

(Testimony of C. Bruce Flick.)

"3. The original contract price of \$2.80 per ton for gypsum presumably was based on a set of actual or anticipated cost figures. We shall appreciate it if you will furnish these figures.

"4. The item of laboratory process control and research amounted to \$7,432.00 for 1943 and \$3,352.00 for 1942. Please give us the breakdown of this item.

"Thanks again for the courtesies extended to Mr. Canvin, Mr. Riddell, and the writer when we visited your plant on January 14.

"Very truly yours,

"Pacific Portland Cement
Company,
/s/ C. B. Flick,
"Controller" [317]

And in the margin opposite the paragraph starting "Please give us the figures for each of these items," there is a notation by Mr. Flick in long-hand, "not month by month, C. B. F."

Q. That is your handwriting on there, isn't it, Mr. Flick?

A. Yes. I did not want to bother them with a lot of monthly detail. I was concerned at the time only with the annual results.

Q. The letter of January 29, 1944 from Mr. Cuneo to you and which has been marked for identification as Defendant's Exhibit A, is the letter that you received in response to your letter of January 18, is it?

(Testimony of C. Bruce Flick.)

A. Yes. It says at the outset, "This letter is in answer to yours of January 18."

Mr. Rosenberg: Now I will offer it in evidence, if the Court please.

Mr. Bennett: Again, Your Honor, I think I am entitled to ask for the purpose of the offer. If the purpose is simply to show the reply and the claim or the assertions made and the positions taken by the defendant, I have no objection for that purpose, but I object to the letter being received in evidence for the purpose of showing in any way the validity, the accuracy or the truth of the statements made or the amount of the figures and items set forth, and further, the propriety or basis for the claimed allocations made in the letter. In other words, Your Honor, I have no objection to this letter being received [318] for the purpose of the defendants stating their claim or position at that time to this plaintiff, but I object to it being received as evidence of the truth or the validity or the accuracy or the existence of the facts shown because it would not be the best evidence and would be incompetent, irrelevant and immaterial.

The Court: For the purpose of the record, state the purpose of the offer.

Mr. Rosenberg: The record shows, if the Court please, this was accounting information given to the plaintiff after the plaintiff had sent its accountant over to the plant and had gone over the record, and it contains the accounting information which had been requested by the controller after an inspec-

(Testimony of C. Bruce Flick.)

tion of our records. Now, I submit the objection goes to the weight of the evidence rather than to its admissibility. The information was furnished at the request of the plaintiff, and the plaintiff is bound by it only to the extent that it has bound itself by its conduct. They already have in evidence the correspondence which they took exception to.

The Court: The objection is overruled. Proceed.

(Defendant's Exhibit A for identification was thereupon received in evidence.)

Mr. Rosenberg: This letter is dated January 29, 1944.

Mr. Bennett: Did the Court overrule the objection as to all purposes and admit this letter for all purposes, including [319] the grounds of my objection?

The Court: It may go in for what it is worth.

Mr. Rosenberg (Reading): "January 29, 1944

"Pacific Portland Cement Company

"417 Montgomery Street

"San Francisco, California

"Attention: Mr. C. B. Flick, Controller

"Gentlemen:

"This letter is in answer to yours of January 18 requesting certain information pertinent to our costs of producing gypsum. Following we present the basis of distributing each class of cost and we believe that such basis has been substantially followed consistently since the inception of the contract.

(Testimony of C. Bruce Flick.)

“1. Operating and Repair Labor.

“Actual time card distribution.

“2. Repair Materials and Supplies.

“Storeroom requisitions and direct purchases.

“3. Fuel, Oil, Gas and Power

“As measured or allocated on load and/or hours use basis.

“4. Workmen's Compensation Insurance

“Self-insurance. Same rate to all departments, but a very low rate has been in effect.

“5. Social Security Taxes.

“Actual on labor. [320]

“6. Water.

“At cost, measured distribution.

“7. Depreciation.

“Proportional to initial plant evaluation.

“8. Insurance

“Fixed %, roughly proportional to the values insurable, but altered to weight properly the explosion hazard, etc., in certain departments.

“9. Taxes

“Fixed %, roughly based upon evaluation of plant.

“10. Laboratory Process Control and Research.

“Laboratory and Process Control: Direct labor basis along with overheads.

“Research: Allocable portion to department served. Unallocable portion and new products—direct labor along with general overhead.

“11. General Plant Expense, Engineering and Maintenance, Supervision, Purchasing and Stores, Accounting and General Overhead.

(Testimony of C. Bruce Flick.)

“Allocation on direct labor basis. (Some accounts first subtract flat amounts for outside locations’ service; others apply to all locations, as General Overhead, and are spread on direct labor all locations.

“12. Bittern

“A nominal and rather arbitrary 20c per ton was [321] charged.

“13. Loading and Shipping Expense

“Actual loading labor and power plus pro-rata of shipping foreman and miscellaneous shipping expense.

“As mentioned to you here, the work sheet which we discussed and of which we furnished you with a typed copy did not include the loading and shipping expense on gypsum inasmuch as the unit cost of this function did not change 1943 over 1942. The reason such cost did not change was that due to scarcity of labor we permitted one man to do the loading job during a portion of 1943 where safety precautions had formerly caused us to have two men always work together on this work.

“Now that you have asked us for full detail of all costs which we had charged against gypsum production, we are herewith submitting our manufacturing cost sheet showing the loading and shipping item to a total production cost figure. The report is then comparable to that which, as per your request, we are also submitting herewith for the fiscal years ending June 30, 1940, and June 30, 1941, detailing costs on which the previous increase was based.

(Testimony of C. Bruce Flick.)

“We do not find any actual or anticipated cost figures used as a basis at the time the original contract price of \$2.80 per ton was arranged.

“Following is the data you asked regarding breakdown of the 1942-1943 laboratory process control and research items: [322]

Gypsum Department			
	1942	1943	% Incr.
Laboratory	\$2,824.27	\$3,374.01	19
Process Control.....	528.23	1,010.85	91
Total Costs			
Laboratory	\$49,844.84	\$63,059.07	26
Process Control.....	9,559.60	18,894.18	97

“Research Department costs in 1942 were low due to staff’s being engaged in new products research for Rubber Reserve Company, but in 1943 new products research represented a substantial charge against Newark operations, comprising \$41,390 of the Research Department total of \$64,274.00. Gypsum Department was charged \$2,804 or 6.78% of this new products research on a Newark direct labor pro rata basis. Gypsum Department also received \$243 in 1943 of directly allocated research charges.

“We hope you will find the foregoing answers your questions of January 18.

“Very truly yours,

“Westvaco Chlorine Products
Corp.

“Vernon E. Cuneo,
“Plant Office Mgr.”

	July '39 thru June '40	July '40 thru June '41	Increase in
	Cost	Per Unit	Unit Cost
Production	27,685 tons	32,000 tons	
Labor, Operations	\$ 5,400.62	\$.19	\$.02
Labor, Repairs	2,945.54	.111	.02
Comp. Ins. & SS Taxes	439.33	.02	.01
Materials, Operations	585.91	.02	.11
Materials, Repairs	2,804.99	.10	.02
Power	3,064.01	.11	.02
Fuel	3,082.39	.11	.02
I.D.C.—Water	985.82	.04	.03
Sub Total	\$19,308.61	\$.70	\$.09
Bittern	2,820.73	.10	.04
Total Direct	\$22,129.34	\$.80	\$.13
Taxes, Ins. & Deprec.	10,379.84	.37	.01
Overhead	8,130.66	.29	.06
I.D.C.—Water	158.06	.01	.01
Total Manufacturing	\$40,797.90	\$1.47	\$.19
Load. & Ship. Expense	5,369.53	.19	.01
Total	\$46,167.48	\$1.66	\$.18

GYPSUM PRODUCTION COSTS

	Year 1942		Year 1943		Increase in Units Cost
	Cost	Per Unit	Cost	Per Unit	
Production	31,826 tons		24,431 tons		
Labor Operations	\$ 8,269.87	\$.26	\$ 9,535.58	\$.39	\$.13
Labor Repairs	3,664.81	.12	3,806.72	.16	.04
Comp. Ins. & SS Taxes	605.94	.02	701.11	.03	.01
Material Operations	106.83	....	568.08	.02	.02
Material Repairs	1,977.95	.06	1,601.67	.07	.01
Power	4,723.33	.15	4,511.12	.18	.03
Fuel	3,125.16	.10	3,364.66	.14	.04
Water	172.45	....	328.90	.01	.01
Sub Total	\$22,646.34	\$.71	\$24,417.84	\$1.00	\$.29
Bittern	6,365.23	.20	4,900.83	.20	....
Total Direct	\$29,011.57	\$.91	\$29,318.67	\$1.20	\$.29
Overhead	13,404.99	.42	20,108.53	82	.40
Taxes, Ins. & Deprec.	13,017.79	.41	11,968.34	49	.08
I.D.C.—Water	44.35	....	75.00	.01	.01
Total Mfg.	\$55,478.70	\$1.74	61,470.54	\$2.52	\$.78
Loading and Shipping Exp.	5,884.37	.19	4,726.04	.19	....

(Testimony of C. Bruce Flick.)

Attached to the letter is, first, a tabulation showing the gypsum production costs for the two periods, July 1939 through 1940 and July 1940 through 1941, and the items which are reflected on that statement are labor operations, labor repairs, compensation insurance and social security taxes, [323] materials, operations, materials, repairs, power, fuel, I.D.C.—water, bittern, taxes, insurance and depreciation, overhead, I.D.C.—water, loading and shipping expense.

Mr. Bennett: Counsel, before you leave there, you have left out certain head totals on the left-hand column. Perhaps Your Honor would be interested in seeing this (handing a copy of the exhibit to the Court).

Certain of the first items that you read are listed under the title "Production." Those were the items listed under the title "Production: Labor, Operations, Labor, Repairs, Compensation Insurance and Social Security Taxes, Materials, Operations, Materials, Repairs, Power, Fuel, O.D.C.—Water."

Then the next title is "Subtotal," and then the item of bittern is set up and then the title "Total Direct," and underneath that are the items of taxes, insurance and depreciation, overhead, I.D.C.—water, and underneath that the words "Total Manufacturing," with the figures given in each instance to the right, and then underneath that "Loading and Shipping Expense," and underneath that the word "Total." I did not mean to embarrass counsel by interrupting, but he apparently had no pur-

(Testimony of C. Bruce Flick.)

pose in mentioning those classifications that I thought might be of interest to the Court at this juncture.

Mr. Rosenberg: Now, the second tabulation is a tabulation of gypsum production costs for the years 1942 and 1943 and the items—— [324]

Mr. Bennett: Couldn't we stipulate, subject of course to the objections I have made——

Mr. Rosenberg: I would just like to read over the items. In the items there is in the tabulation for each year under the heading of "Production," labor, operations, labor, repairs, compensation insurance and social security taxes, material operation, material repairs, power, fuel and water.

Mr. Rosenberg: I think I may say that the items shown are identical with those shown on the previous tabulation, if I am correct.

Mr. Bennett: That is what I had in mind.

Q. (Mr. Rosenberg): At the time that you wrote this letter of January 29, 1944, Mr. Flick, you examined those tabulations that were attached to the letter, did you? A. Yes.

Q. And there was no doubt at that time that the \$2.98 price included overhead and indirect expense, so that you were fully apprised of that fact upon receipt of this letter, were you not?

A. Upon receipt of this letter I was apprised for the first time of the cost figures which purported to support an 18-cent increase. Previous to that I had only the letter which was previously referred to here, which Mr. Hurlbert had written Mr.

(Testimony of C. Bruce Flick.)

Canvin, detailing only the labor, material and power.

Q. I assume that upon receipt of that letter, and at all times thereafter, you knew that the \$2.98 price was based upon an 18-cent increase, which included in the items, the total of 18 cents, an increase in cost of production, overhead, and indirect charges?

A. I had Westvaco's—yes, their cost figures would show. I don't know that the price was accepted by Pacific on that basis.

Q. Did Pacific continue paying the price after you received the letter? [326]

A. Pacific was paying \$2.98 before I entered Pacific's employ, and continued to pay it thereafter.

Q. For how long?

A. Pacific paid \$2.98 until September 4, 1946.

Q. That was with your knowledge, was it?

A. Yes.

Q. You knew all during that time that the 18-cent increase that increased the price from \$2.80 to \$2.98, at least at all times after receipt of the letter of January 29, 1944, you knew that that 18-cent increase included overhead and indirect charges, didn't you? A. Yes.

Q. And, as a matter of fact, later in the year there was a written agreement in letter form between Westvaco and Pacific, was there not, whereby Westvaco agreed that it would not avail itself of

(Testimony of C. Bruce Flick.)

the escalator clause for a period of approximately a year; isn't that true?

A. I believe there was such an agreement. The OPA price regulation froze the price at \$2.98.

Mr. Bennett: Would you read the question and the answer, please, Mr. Reporter?

(Record read by the reporter.)

Q. (Mr. Rosenberg): Now, I would like to just refer to these figures here a moment. This \$1, what does that represent?

A. May I refer to this detail I have, the details of that [327] dollar?

Q. Will you explain first what you are referring to?

A. This is a photostatic copy of figures which were furnished by Westvaco at our request.

Q. Yes, that was furnished by the attorneys for Westvaco to the attorneys for Pacific Portland Cement?

A. I believe so.

Q. Since this lawsuit was instituted?

A. Yes.

Q. Isn't that right?

A. Yes.

Q. You prepared the work sheets in blank, did you not?

A. I put the headings in.

Q. Then you gave them to Pillsbury, Madison & Sutro for them in turn to present to us with a request that we provide the information; is that right?

A. That's right.

Q. So there can't be any question about the information that was furnished, there is, first, one sheet for a detail of shipping expense for the cal-

(Testimony of C. Bruce Flick.)

endar year 1937, and the calendar year 1938, the period from July 1, 1939 to June 30, 1940, from July 1, 1940 to June 30, 1941, for the calendar year 1942, for the calendar year 1943, and for the period from July 1, 1944 to June 30, 1945, and the period from July 1, 1945 to June 30, 1946; is that right?

A. Yes, that is correct.

Q. Then the next sheet is overhead and general expense for those same periods; is that true? Well, you have such a sheet. I may not have mine in the same order that you have yours.

A. Yes. Overhead and general plant expense.

Q. You prepared that form designating the information you desire; is that right?

A. The headings only.

Q. Yes. A. Yes.

Q. The figures were furnished by Westvaco Chlorine Products Corp.? A. Yes.

Q. There is another sheet for bittern, insurance, taxes, depreciation, inter-departmental water, sulphuric acid, supervision for the same period.

A. Yes.

Q. Another sheet, "Direct charges," Westvaco's charges on the books for cost of production of gypsum, direct charges, and for the same period?

A. Yes.

Q. Then a summary page for the same period accumulating the information contained in the other sheets; is that right? A. That is correct.

Q. Now, to get back to this, what is this dollar supposed to represent?

(Testimony of C. Bruce Flick.)

A. For the calendar year 1943, Westvaco's figures showed that the sum or aggregate of the items classified as direct charges totaled \$1 per ton of gypsum.

Q. And the 19 cents, that is what?

A. 19 cents shipping expense.

Q. So that this total of \$1.19, that is not your language down there, that is Mr. Bennett's—

Mr. Bennett: No, that is mine. I have no objection to your erasing that, if you want to, and writing your own figures.

Mr. Rosenberg: Well, I have not suggested that I do that. You don't even know that I have any objection to it, Mr. Bennett.

Mr. Bennett: I beg your pardon.

Mr. Rosenberg: You are a little touchy, aren't you?

Mr. Bennett: I thought I would offer to erase that if you wished.

Mr. Rosenberg: Well, I think that would be a very proper way to do it.

Mr. Bennett: All right.

Mr. Rosenberg: That, in fact, is the direct and shipping cost as shown on the sheet from which you are reading; is that right?

Mr. Bennett: The direct and what? [330]

Mr. Rosenberg: And shipping expense.

The Witness: Yes, The \$1 comes from this page marked "Direct charges," and the 19 cents is shown on the page, "For shipping expense."

(Testimony of C. Bruce Flick.)

Q. That does not include anything for overhead and general plant expense, does it?

A. The shipping expense sheet shows some allocated expenses. The direct charges do not include any overhead or general plant expense.

Q. The \$1.19 figure includes nothing for bittern, does it? A. No.

Q. And it includes nothing for insurance?

A. No.

Q. It includes nothing for taxes? A. No.

Q. Does not include any depreciation on the gypsum plant? A. No.

Q. Does not include anything for water used in the gypsum plant, does it? A. Yes.

Q. I am sorry. It does not include any indirect charge for water, does it?

A. It does not include an item called "inter-departmental water."

Q. It includes nothing for sulphuric acid, does it? [331]

A. Nothing for sulphuric acid.

Q. It includes nothing for supervision, does it?

A. Nothing for supervision.

Q. Now, on this figure, here, as I understand it, that \$3.27, that is the \$2.98 price that Pacific has been paying for a good number of years, plus the sum of \$1.19 on direct charges; is that right?

A. No.

Q. Oh, plus 29 cents on \$2.98—

The Court: Just a minute, gentlemen. Remember the reporter.

(Testimony of C. Bruce Flick.)

Mr. Rosenberg: That is the \$2.98 price plus 29 cents in direct charges which Pacific has been willing and concedes have been correctly included in cost of production of gypsum; is that right?

A. Just to clarify it a little bit, the direct charges for the year 1942 were 71 cents, and for the year 1943 they were \$1, so there was an increase of 29 cents which Pacific was quite willing to pay, that would be 29 cents plus the \$2.98, making \$3.27 which Pacific was willing to pay.

Mr. Rosenberg: Then I think the purpose of this was to show that if we accepted the \$3.27 that on the basis of our own figures of \$2.71 we would have made a profit of 56 cents a ton; is that right?

Mr. Bennett: I object to that. You can ask me why I put [332] the figures there. The figures were written on the board by me. If you want to ask me what my purpose was, do so.

Mr. Rosenberg: I will withdraw the question.

Q. Assuming, Mr. Flick, that the purpose of these figures is to show that if Westvaco accepted that price of \$3.27 per ton, that based on their own cost figures they would make a profit of 56 cents a ton; isn't that correct?

Mr. Bennett: I believe I am entitled to answer that.

Mr. Rosenberg: Will you tell me what that is?

Mr. Bennett: Yes. According to figures furnished in the classifications of the defendant, they had for that period 1942, \$1.19 so-called direct charges. Now, that was the per-ton actual cost of

(Testimony of C. Bruce Flick.)

manufacture, the actual tonnage. If we are to deduct the actual cost, or out-of-pocket cost from \$3.27 that we were willing to pay it would have left a profit of approximately over \$2 a ton, but I put this figure \$2.71 here to show, as I think your figures purport to show in this exhibit or document the witness is referring to, that the total cost, all the cost of these direct charges, or actual charges of \$1.19, plus all your allocated charges and overhead charges, according to your claim, and according to your figures would amount to \$2.71 per ton, and that that would leave a net profit here of 56 cents a ton. The reason I illustrated it at the time was, as I remember it, at that time the defendant was threatening to close down the plant, because they could not operate at a [333] profit, or, rather, they were threatening to stop the production of gypsum because they could not produce that at a profit. I wanted to show they were making over \$2 profit even allowing all their overhead as a part of the price, they would still have a profit of 56 cents per ton. That was the only purpose that I had in putting the figures on the blackboard.

Mr. Rosenberg: Now, I will ask the witness whether it is true that if Westvaco accepted \$3.27 a ton for the gypsum and if it is true that its cost figure was \$2.71, that it would realize a profit of 56 cents per ton.

Mr. Bennett: I think that is a matter of arithmetic, your Honor.

The Court: We have an accountant here.

(Testimony of C. Bruce Flick.)

Mr. Bennett: Well, maybe it is my error, though.

Mr. Rosenberg: Yes, that is within the realm of possibility. That may be possible.

The Court: I think it is time to take a recess until two o'clock.

(A recess was taken until two o'clock p.m.)

Afternoon Session, December 12, 1947, 2:00 p.m.

C. BRUCE FLICK

resumed the stand;

Cross-Examination (continued)

The Court: You may proceed.

Mr. Rosenberg: Will the reporter read the last question?

(Question read by the reporter.)

Mr. Bennett: I think I answered that question which I thought was addressed to me. If counsel wants the witness to answer it I have no objection.

The Court: Proceed.

A. (The Witness): At that time they were talking of discontinuing the production and the profit figure based on direct charges would be the difference between \$3.27 and \$1.19, or \$2.08. If they quit making the gypsum they would give up \$2.08 a ton. The figures on the blackboard speak for themselves. If they received \$3.27 a ton and if the cost was \$2.71, which of course includes overhead allocations and all that, they would have what you would term a gross profit of 56 cents.

Q. What deductions would be taken off that 56 cents, if any?

(Testimony of C. Bruce Flick.)

A. I am not familiar with Westvaco's books, other than these figures we have got.

Q. Let me ask you this, if at the time this discussion took place when you were offering \$3.27 a ton for the gypsum, and if at that time our cost was \$2.71 per ton, and if we agreed [335] to accept \$3.27 a ton, do you think we would have realized a profit of 56 cents a ton from that time on?

A. I have no idea.

Q. Well, how much would your credit deductions amount to a year for the so-called deductions off the gypsum, how much is that amount?

Mr. Bennett: I object to that as wholly irrelevant.

The Court: If he knows he may answer.

A. (The Witness): I don't know how much our deductions would have amounted to.

Q. (Mr. Rosenberg): How much did it amount to for the 42-month period from September, 1944, until October, 1946?

A. I don't know.

Q. How much—do you have any approximate idea?

A. It would be expressing a guess.

Q. Would you question that it amounted to over \$8400?

A. I have no idea without looking the figures up. I would hesitate to say whether it is correct, or not, because I really don't know at this moment.

Q. Do you have your figures in court?

A. No.

Q. Assuming that the credit deductions that Pacific took for so-called deficiencies in gypsum

(Testimony of C. Bruce Flick.)

content was eight thousand odd dollars for a two-year period, that would materially affect the so-called profit of 56 cents on that blackboard, [336] wouldn't it?

Mr. Bennett: I want to interrupt to object because by virtue of the facts in this case no such figure is claimed. The figure now claimed, I think, as stated by counsel, was either the maximum of \$2100, or something of that kind, of which \$500 has been tendered, leaving in dispute a figure of something like fifteen or sixteen hundred dollars as being the amount in dispute as to the deficiencies for over-payment.

Mr. Rosenberg: Mr. Bennett, I am sure you know the amount you mentioned of \$2100 is not the total credit deductions taken by Pacific. Those are only the credit deductions which we questioned. There are a number of credit deductions which we do not question, but which we would have which would very definitely and positively reduce the net amount that we receive for our product. If we are charging \$2.98 a ton and you take off 20 cents a ton, we get \$2.78 a ton.

Mr. Bennett: I did not understand your question. I am sorry; you may answer.

A. (The Witness): Yes, because the price is per ton of gypsum, and under the contract when the gypsum falls below 95.51 percent gypsum value there is a charge-back provided for gypsum that falls below a particular point, then there is a charge-back.

(Testimony of C. Bruce Flick.)

Q. (Mr. Rosenberg): So you would be willing to concede, wouldn't you, in the normal course of operations, and just by the experience of the parties during the time this contract [337] has been in existence that if we got only \$3.27 a ton we would not realize 56 cents a ton profit, assuming the correctness of our information, of course, of \$2.71 a ton?

A. Yes, with just one qualification, that is, that we don't know what it cost to make gypsum of 95.51 percent purity, and what it cost to make gypsum that falls below that. It is possible that Westvaco does have some off-set that they can charge back for the inferior gypsum. It is possible there will be some off-set, I don't know.

Q. You have no reason to even suspect that it cost any less to make gypsum of 95.51 percent of gypsum content than it does to make gypsum of 90 percent?

A. I don't know. I remember Mr. Wallace told me on one occasion that if we did not insist on keeping the quality up they could turn out more gypsum. That would indicate to me there may be some relationship there.

Q. When did Mr. Wallace tell you that?

A. In one of our conversations.

Q. Which conversation?

A. I can't give you the date of it.

Q. You mentioned in your testimony yesterday that one of the things that you took into consideration in determining that gypsum was a by-product

(Testimony of C. Bruce Flick.)

was that under the contract it was sold for, I don't know whether you said \$2.98 or \$3.76, and magnesia, on the other hand, was selling for something like \$30 or \$40 a ton.

A. I believe I used the figure of magnesium oxide, \$46 a ton, and I believe I compared that with gypsum at the claimed price of \$4.36. In other words, one is worth 10 times as much as the other.

Q. That was a factor to which you gave consideration in arriving at your ultimate conclusion that gypsum was a by-product?

A. The basic reason for saying gypsum is a by-product is because it said so in the contract.

Q. What was that? Will you read the answer of the witness?

(The record was read by the reporter.)

Mr. Rosenberg: It says so in the contract?

A. And, furthermore, the characteristics are those typical of a by-product. In other words, you have to get the sulphate impurities out before you can get the main magnesia product, magnesium chloride, magnesium oxide.

Q. Is it or is it not true that one of the considerations that motivated your ultimate conclusion is the difference in the sales price between gypsum and magnesium oxide, as you said yesterday? I am not asking whether it was controlling. Is that one of the factors to which you gave consideration?

A. That is a factor in considering whether an item is a by-product. In this case, the gypsum was a valueless waste before processing.

(Testimony of C. Bruce Flick.)

Q. On what do you base that? [339]

A. Dr. Seaton described it as such.

Q. What did he say? Can you tell me what he said?

A. Dr. Seaton said, if I remember his words, this by-product gypsum would be a valueless waste if it were not for the favorable location here, which enables us to make something out of it.

Q. Is this the remark to which you refer: "The by-product gypsum from the process, through the operation of favorable location factors is marketable at a profit instead of being a valueless waste."

A. That's right.

Q. You construe that to mean that it is a valueless waste?

A. It would be a valueless waste if it were not processed and sold to Pacific Portland Cement Company under this contract. They dumped it in the bay for two weeks.

Q. How much would magnesium chloride be worth if we dumped it in the bay?

A. You can tell me that.

Q. You are the expert.

A. I am not an expert on magnesium chloride. I know the process there calls for magnesium oxide as the major product, and gypsum is the by-product.

Q. Did you have anything to do with the preparation of this chart? A. Yes.

Q. You tell me what use would magnesium chloride be which you [340] designated on here as the primary product if it was not processed?

(Testimony of C. Bruce Flick.)

Mr. Bennett: That is a misstatement of counsel. He does not designate magnesium chloride as a primary product. The chart designates it——

Mr. Rosenberg: Oh, all right; I am sorry.

Mr. Bennett: It comes down here to another and further processing producing the end product, magnesium oxide.

Mr. Rosenberg: Let me ask this question, if you ran the magnesium chloride in the bay it wouldn't have any more value than the gypsum would have if you ran it into the bay?

A. If you ran the magnesium chloride into the bay the magnesium chloride in the bay would have no value.

Q. To get back, I believe you said one of the factors, not the controlling factor, but one of the factors to which you gave consideration in determining that gypsum is a by-product is the fact that gypsum, under our contract, is sold at a certain price, and magnesium oxide, I believe you said, was selling at about \$46 a ton? A. Yes.

Q. How much has Pacific been selling this gypsum for during the term of this contract?

Mr. Bennett: We will object to that as incompetent, irrelevant, and immaterial, and not proper cross-examination, and the further reason that it involves obviously a trade secret [341] of the plaintiff that can have no possible bearing in this case. Your Honor recalls that we sought to inquire as to books and accounts of the defendant to ascertain the basis on which allocations were made, and im-

(Testimony of C. Bruce Flick.)

mediately the objection was raised, which was again stated here, that that would involve the price paid for the product and that would embrace their—let me state it this way, it would involve the consideration for which products were sold, the price for which products were sold to customers. It is wholly immaterial, and aside from any possible issue in this case, as to what Pacific sells any of the gypsum that they bought for. After all, these people are competitors of Pacific. The revealing of matters of that kind is not a proper subject in this kind of litigation, the revelation of a trade secret. I submit the matter is wholly unrelated. I submit they should not be permitted to go into something that is wholly irrelevant to any issue involved. For example, this witness's testimony on direct examination—I say there is a greater reason for that, they have denied us access to the books requiring us to hire an accountant who would be pledged to keep secret and confidential certain of these things included in the very matter which is the subject of this case. I submit this case and the testimony of the witness so far does not entitle the defendant to go into a matter of that kind. It can only be designed for the purpose of perhaps creating some situation showing where they are selling the gypsum. [342]

Mr. Rosenberg: In the first place, certainly this has some relevancy. You can see the display that is made on this blackboard in an attempt to show, and that is not factually correct, it has been stated so

(Testimony of C. Bruce Flick.)

by the witness. However, we know from this that we accepted a price which was around 80 cents a ton less than we are entitled to under the contract, but as far as it not being within the scope of the direct, the witness just testified that one of the motivations considered which led to his conclusion as to the status of this product as either a main product, a joint product, or a by-product was the difference in value as between that product and other products that we produce.

The Court: The court is prepared to rule. Both sides had an equal opportunity to be heard.

Mr. Bennett: I don't want to prolong argument if your Honor does not wish it. There was one statement I wished to correct.

The Court: Read the question.

(The record was read by the reporter.)

The Court: Overruled.

A. (The Witness): Pacific has resold the gypsum at various prices. It is difficult to strike an average. Pacific has also used the gypsum in its own operations and in order to determine what the average price would be it would require a great deal of accounting and computing to get at that. As you know, we have a gypsum plant at Gerlach, Nevada. Naturally, [343] we synchronize our Gerlach, Nevada gypsum operation with this source of supply. This is an adjunct to our gypsum division, so that the two are operated to best advantage together, naturally. We may at times serve certain

(Testimony of C. Bruce Flick.)

trade from Gerlach and other times we may serve the same trade from Westvaco.

The Court: At the market price of gypsum from time to time?

A. Yes. I might say this, that gypsum, as cement retarder, it is not one of the most important ones for this particular gypsum we sell at our Gerlach, Nevada, plant, at 3.50 a ton at the present time. That gives you some idea of the manufacture the value to the manufacturer at his plant.

Q. (Mr. Rosenberg): Mr. Flick, is that mined gypsum? A. That's right.

Q. Permanente has been your biggest customer for the gypsum that you have been buying from Westvaco, hasn't it?

A. Do I have to disclose that?

Mr. Rosenberg: Well, we know that.

Mr. Bennett: I don't think the witness——

Mr. Rosenberg: Withdraw the question.

Mr. Bennett: Let me say one more word. Counsel says the pertinency of this line of cross-examination is caused by what I illustrated as to their product. The only reason I did that, your Honor, was because——

Mr. Rosenberg: That is not true.

Mr. Bennett: Let me finish. I think the court will realize [344] what it was. I did it because it did not involve any question of business secrets. The witness testified, I am sure your Honor will recall, that Mr. Williams, or somebody from the defendant, had said they were going to shut down

(Testimony of C. Bruce Flick.)

their gypsum operations because unless we increased the price to 3.27 they could not operate at a profit. We wish to show that statement by Mr. Williams was false. That was the sole and only purpose of it, and I submit, your Honor, this shows it because the witness says the actual out-of-pocket expense even according to their figures, would amount to 1.19 a ton. The price we are willing to pay was 3.27, less some deductions here and there. I will show that from the figures later on, it wouldn't be a substantial deduction as related to price per ton. This was all done for the purpose of showing that that statement by Mr. Williams was not correct.

I submit that that does not offer any basis to permit this defendant to refuse to give us information which the contract said we would have the right to, because it would be, it would involve confidential trade secrets, which objection your Honor upheld here. To permit, under the guise of cross-examination, the revelation of private business secrets of this concern wholly unrelated to any issue here, and wholly unrelated to anything this witness testified to on direct examination, I submit, your Honor, is not only improper, but highly prejudicial. It is permitting the very people who your Honor said we should not be permitted to have information from——

The Court: What did I deny you?

Mr. Bennett: You denied us the right to go down and examine, for Mr. Flick to go down and make an examination of the books and accounts of

(Testimony of C. Bruce Flick.)

the defendant in this case for the purpose of determining——

The Court: The record already discloses that you went down there.

Mr. Bennett: The record also discloses——

The Court: Am I in error on that?

Mr. Bennett: We went down, your Honor, but we were not permitted to see all of their books.

The Court: What books?

Mr. Bennett: The books that were involved in the motions before your Honor. Your Honor recalls it.

The Court: I recall that, but I want to know what you were denied by any order of the court.

Mr. Bennett: Well, I will let the witness describe that.

The Court: No. You are addressing the court. You made a statement here that I denied you an examination of those books. I want to know in what respect I did that.

Mr. Bennett: I was not the one who presented that motion, but I can relate it perhaps indirectly. Mr. Kaapeke was the one who presented the motion.

The Court: Step forward. [346]

Mr. Kaapeke: Your Honor, at the argument of those motions Mr. Rosenberg and I argued at some length, I believe——

The Court: Let me refresh your memory, or perhaps it is my memory that is failing. The first time I suggested you get together, did I not?

Mr. Kaapeke: Yes, that's right.

(Testimony of C. Bruce Flick.)

The Court: You left, and you came in again on second motions.

Mr. Kaapcke: No. The next motion was Mr. Rosenberg's.

The Court: Well, what happened to that?

Mr. Kaapcke: That was granted.

Mr. Rosenberg: That had no reference to our records.

Mr. Kaapcke: If I could go back a minute, I would like you to bear with me a moment.

The Court: All right.

Mr. Kaapcke: Mr. Rosenberg and I argued at some length and your Honor said, and I recall your words, because they startled me, "The motions and each of them will be denied."

The Court: What were the motions?

Mr. Kaapcke: The motions were for an order to inspect their records and an order further to answer interrogatories.

The Court: Wait a minute. The books were denied in what respect?

Mr. Kaapcke: Because these people have many allocations and in order to check the accuracy of those allocations, if [347] there should be any propriety in checking items we must have not only the data as to the gypsum, allocation factors that related to gypsum, but the allocation factors that related to the other products.

The Court: What other products?

Mr. Kaapcke: Well, magnesium oxide and other chemicals, to ascertain the allocations as being

(Testimony of C. Bruce Flick.)

made between those two. When your Honor used the words that I just described, I asked your Honor, there was discussion about getting together, and I asked your Honor if you would retain the motion on the calendar until we saw whether we might get together on that.

The Court: Yes.

Mr. Kaapcke: Then Mr. Rosenberg and I began to discuss whether we could get together on what he could furnish. Then always as a basis for that discussion was the underlying reservation by him that these people were really competitors, competitive companies, and trade secrets were the things that we would not be permitted to see.

Now, there was the matter of sending an experienced certified public accountant down there to check these things that we, ourselves, may not see, and on that basis we decided that we could not pursue that course, among other things the cost of hiring an outside accountant to do that was inordinate to the purpose in mind, and it was not done. We then prepared and submitted to Mr. Rosenberg with no concession that we were [348] accepting the information without question these accounting sheets and the data that appears upon them, those accounting sheets.

In this matter that we described we were, as your Honor will see, deprived of the opportunity to look at their books for verifying these things we have been furnished, and also the data as to other products, their sales of magnesia, the price of sales to

(Testimony of C. Bruce Flick.)

other people, their percentage of product that was purchased and how much they paid for it. We were not given access to it, and those things were unavailable to us.

The Court: I will hear from counsel.

Mr. Rosenberg: I think counsel's statement is substantially correct. In other words, the court did not deny the motion. The court stated or suggested we see if we could get together. The only reason the court considered denying the motion was that I represented in court that any particular product they were entitled to see was these records relating to gypsum, and they wanted to go into all of the records regardless, the production and sales of all of our products, and I had no objection to them having that evidence, but I did not think it should be obtained in that manner, and in the course of discussion between counsel that morning I said, "You can go into our books and see anything you want that relates to the production of gypsum, and I will consent that an experienced certified public accountant go into the records of our tonnage production of all the products and certify to the ultimate [349] figures which will give you the information you want without disclosing that what we consider confidential." So I would say they were offered full access to our books as to anything that would relate to this litigation. They decided that the matter of having a certified public accountant would be too costly and would I, if they gave me forms on which they were to outline in blank in-

(Testimony of C. Bruce Flick.)

formation wanted, would I furnish that in lieu of them making an inspection of our records. I told them that I would, and we did it. On November 24th I sent over to Pillsbury, Madison & Sutro a letter in which I stated, "I am enclosing herewith" (reading letter).

They got the information, they still have it, and I have never received any response from them referring to my statement that it was furnished in satisfaction of the motion. [350]

The Court: I am going to ask you the direct question now so we will have a record: What books were they denied?

Mr. Rosenberg: The only books of which I know to which they were denied access, if the Court please, are the records showing our production figures and our sales figures on products other than gypsum. We did offer to let any recognized or, I guess, any certified public accountant, because that carries with it the stamp of reputability, go in and get out the figures. All they were interested in were the aggregate figures. They were not interested in who we sold to or how much, and we offered to permit them to get that through a certified public accountant, through a certified statement; so I would say they have not been denied access to any records that they require in order to fully check the accuracy and the propriety of our bookkeeping records.

Mr. Bennett: If Your Honor please, may I say something on that, and I will ask counsel the ques-

(Testimony of C. Bruce Flick.)

tion: Counsel, it is true you have refused our request as to the price you paid for your bittern, have you not?

Mr. Rosenberg: I can't answer that, Mr. Bennett. I do not know it to be true.

Mr. Bennett: Will you give us at this time the price that you paid for your bittern?

Mr. Rosenberg: If the Court considers it relevant, certainly we will, but there is no controversy involved in any of [351] these price increases over the cost of the bittern. In other words, in none of our price increases, if the Court please, has the cost of the bittern entered into the increase, so that that can be nothing other than a curious desire to see the terms of a private contract that we have with the Leslie Salt people. So if the Court feels they are entitled to it, of course, we would have no alternative. We would prefer not. We do not see any sense in going into records that won't shed any light on the issues involved in this litigation.

Mr. Bennett: Do you mean you withdraw this question of the witness?

Mr. Rosenberg: No, I am not withdrawing anything because you have placed it on a completely fallacious basis. You are implying to the Court that I am using as a foundation for my question the fact that you purported to compute our profit, and I think I have clearly stated to the Court that the basis for my question is that the witness in his direct examination said that one of the considerations that motivated his conclusion that gypsum is

(Testimony of C. Bruce Flick.)

a by-product is the difference between the market value of the gypsum and the market value of our magnesium products. And so I am asking the very concern that creates the market on this manufactured gypsum to tell me what they were selling the gypsum for.

Mr. Bennett: In the first place, Your Honor, that is wholly irrelevant because the contract sets the price of it. [352] We are not concerned with the market price of gypsum necessarily, except we have a contract price here and there is no contention that the contract price—you do not contend that the market price of gypsum is as much as the market price of magnesium sulphate, do you, or magnesium oxide?

The Court: The Court is prepared to rule, gentlemen. If you take a check of our procedure here, you will find that we are utilizing too much time entirely in argument.

Mr. Bennett: We may, Your Honor, but, I think, Your Honor, it is an important thing.

The Court: I will have to try and determine that.

Mr. Bennett: I wanted Your Honor to, but I wanted Your Honor to determine it with at least as full an understanding as counsel could give it to you.

The Court: I went through this, and I allowed some latitude. I understand exactly what happened at most appearances here and the circumstances surrounding the matter. I have a very vivid recol-

(Testimony of C. Bruce Flick.)

lection of it. I exhausted every effort I had to get the parties together. They did get together, finally compromising on sending an accountant out there. That is the last I heard.

Mr. Bennett: We did not send an accountant.

The Court: I have no control over that. The Court is prepared to rule. Proceed.

Q. (Mr. Rosenberg): Is this true, Mr. Flick, that the [353] great bulk of the gypsum that you purchased from Westvaco Chlorine Products Company has in turn been resold by Pacific Portland Cement Company to the Permanente Company for use as a cement retarder?

A. A substantial part of it has been resold to Permanente for use as a cement retarder. It has varied from time to time.

Q. What has been the price range of the prices which Permanente has paid you for the gypsum you have purchased from Westvaco for use as a cement retarder?

Mr. Bennett: I object to that question on the ground it is incompetent, irrelevant and immaterial, not proper cross examination and highly prejudicial to the plaintiff in that it will result, if allowed, in the revealing of a matter that is a confidential trade secret, disadvantageous to the plaintiff to be revealed, and without any relevancy at all to any issue involved in this case.

Mr. Rosenberg: I will withdraw that question for a moment and put it this way to see how confidential the information is.

(Testimony of C. Bruce Flick.)

Q. Is it true, Mr. Flick, that the price that Permanente was paying to Pacific Portland Cement Company for this gypsum in October, 1946, was \$6.83 a ton?

Mr. Bennett: Same objection, Your Honor.

The Court: The objection is overruled. You may answer.

A. Did you say \$6.96?

Q. (Mr. Rosenberg): \$6.83. [354]

A. At \$6.83?

Q. Yes. A. In October, 1946?

Q. Yes.

A. Well, I would really have to check the records to verify that figure, Mr. Rosenberg. I am sorry I do not remember it accurately.

Q. Have there been frequent changes in the price of gypsum to Permanente?

A. I wouldn't say there had been frequent changes, no. You will recall that during the period of OPA price control, maximum prices were frozen and there was no change at all.

Q. What was the freeze price to Permanente?

A. The freeze price, as I remember it, was \$4.98.

Q. And then what is your best recollection of the price since the freeze?

A. The gypsum was decontrolled as cement retarder on September 4, and I believe the figure \$6.78 comes to my mind.

Q. So that during the time that you were buying it from Westvaco at \$2.98 you were selling it for \$4.98, is that it?

(Testimony of C. Bruce Flick.)

A. \$4.98 less a two per cent cash discount. I believe.

Q. And this gypsum that goes to Permanente is shipped upon your shipping instructions directly from the Westvaco plant to Permanente, is that true?

A. That is true. It is loaded bulk on board cars at Newark [355] and shipped direct to Permanente if it is sold to Permanente.

Q. Throughout the recent period of the contract, a very substantial part of the total gypsum purchased by Pacific from Westvaco has gone to Permanente, isn't that true?

Mr. Bennett: If Your Honor please, just so the record is clear, my objection, as I understand, runs through this whole line of questioning?

The Court: Let the record so show.

Q. (Mr. Rosenberg): That is true, isn't it, Mr. Flick?

A. A substantial portion, yes.

Q. And that gypsum your people never see, never handle, never touch, is that right?

A. Never see, never handle, never touch—that is correct.

Q. Tell me this as to the gypsum that you take delivery on from us—and when I speak of “us” I mean Westvaco—for use in your plant, the Pacific Portland Cement Company plant, that comes in in box cars, does it?

A. I think it does. I would not be sure at the moment whether it is always box cars or gondolas.

(Testimony of C. Bruce Flick.)

It is in bulk at any rate. It is in bulk in freight cars.

Q. It is in bulk in freight cars, and then how is that product used by Pacific? Is it dumped in a storage place or is it used directly out of the cars or is it fed from the cars into a production line? How does Pacific use that product? Can you tell me that? [356]

A. I believe that they first have to unload the cars into storage and then it is used by Pacific for cement retarder. It may be used by Pacific for agricultural gypsum. Those are the main uses: agricultural and cement retarder.

Q. And you keep that gypsum separate and apart from your mined gypsum, I presume, do you?

A. Well, I do not know whether there is a physical separation deliberately or necessarily. It comes in from a different source, and I think, as a matter, they probably have separate bins.

Q. Do you have any idea how much the average amount of this manufactured gypsum that you buy from Westvaco that Pacific has on hand in storage?

A. No, I really don't. I would say it would not be a very large amount.

Q. What do you mean by a very large amount?

A. Oh, 500 tons maybe, somewhere in there. I really don't know. But I do know there is no great quantity of a thing of that sort stored.

(Testimony of C. Bruce Flick.)

Q. Do you think you might have as much as 500 tons on hand?

A. It could be. Could be.

Q. That would be about 10 carloads?

A. I am just guessing, really.

Q. I mean, if your guess is right.

A. 500 tons would be about 10 cars, but I really do not know. [357] I hesitate to use figures like that.

Mr. Bennett: May I ask the purpose of this line of examination, both as to the price at which Pacific sold this gypsum to Permanente and the quantities stored at the Pacific plant at Redwood City? I ask that because I may want to make a motion to strike the answer, Your Honor.

Mr. Rosenberg: I think I stated the purpose of asking for the price.

Mr. Bennett: No I do, not know yet. Is it the purpose to establish a market price for gypsum or is it designed for the purpose merely to show that we got a profit from this gypsum?

Mr. Rosenberg: Well, let us say it is for the same purpose that you put here on the board, that our total cost is \$1.19 and we are asking for \$3.77.

Mr. Bennett: Then I move to strike it out, Your Honor, on the ground that it does not prove anything of the kind. The only thing that it could prove at all is that Pacific sold their gypsum at a profit. Now, that is something wholly irrelevant to this case. The only thing it could be offered to serve for is to let Your Honor see we made

(Testimony of C. Bruce Flick.)

a profit and for that reason we ought to pay their price, and the fact is whether or not we made a profit, a dime or ten dollars per ton, has nothing to do with this case whatsoever. This court is to decide law questions here upon legal principles and not upon any basis, well, the plaintiffs are making a profit out of the [358] sale of this gypsum: therefore they ought to give some more money even though the contract does not require it. Counsel should have answered that question.

Mr. Rosenberg: I have answered it, counsel.

Mr. Bennett: I move to strike the answer, if Your Honor please.

The Court: I am glad you gentlemen get along so well. The motion will be denied. Proceed with this case.

Q. (By Mr. Rosenberg): Mr. Flick, you mentioned you had a conference with Mr. Wallace, and I believe you said Mr. Williams in January, 1944, is that right? A. I believe so.

Q. At any rate, you wrote a letter to Dr. Seaton in New York—if I am correct, the date is March 11, 1944, Exhibit 8—to which Dr. Seaton replied and told you that he would be out here in April and he would talk to you at that time; do you recall that? A. Yes.

Q. And then you said that Dr. Seaton did come out and you had a conference with him, is that right? A. That is correct.

(Testimony of C. Bruce Flick.)

Q. Tell me what was discussed at that conversation you had with Dr Seaton

A. We discussed this whole question of the price to be paid for the gypsum and the accounts, the charges to the cost of [359] production of this gypsum, the Westvaco's accounting system, accounting methods, and we questioned how we might settle our differences and find a way to get along in the future, and so forth, a general sort of discussion.

Q. What was that?

A. There was a general discussion along those lines. We were covering the same ground that I had been over with Mr. Williams and Mr. Wallace.

Q. Do you have notes on that conference, as you do on all your other conferences?

A. I do not have notes on all my conferences. It is my custom to make notes when I think it is something worth having in the future.

Q. Did you make any notes on that particular conference? A. I may have.

Q. Will you look and see?

A. I haven't them with me.

Q. Was Mr. Wallace present at that conference?

A. Yes.

Q. Was there any discussion at that time about the cancelation clause in the contract?

A. The cancelation clause?

Q. Yes, about possibly amending the contract to make the cancelation clause mutual so that Westvaco would have a cancelation privilege as well as Pacific. [360]

(Testimony of C. Bruce Flick.)

A. I do not remember specific discussion about the cancelation clause. There may have been. There was a good deal of general conversation about the escalator clause and the fact that Westvaco seemed to interpret it to work in only one direction, and we thought it ought fairly to work in both directions, and it seems to me it was in that connection that Dr. Seaton said, "Well, you have got a cancelation clause." I do not remember any particular discussion about the cancelation clause. There was a general discussion about the contract.

Q. Is this true, that in the course of that conversation you told Dr. Seaton that you thought that this escalator clause ought to be modified so that it would work down as well as upward and Dr. Seaton said, "Well, you have a cancelation clause that only works one way and perhaps if we can modify one we can modify both." Do you remember something of that sort?

A. I remember we discussed the escalator clause and the fact that we felt that it fairly ought to work in both directions, and that Dr. Seaton probably did say that, reminding us in that connection we had a cancelation clause. I remember very definitely Dr. Seaton's position that if we were going to talk about modifying the contract in any way, that it was his position that nothing whatever should be modified unless the entire contract were renegotiated from scratch. But nothing was done along these lines.

(Testimony of C. Bruce Flick.)

Q. Mr. Flick, is this true, that from the time that you [361] familiarized yourself with this contract and the transactions of the parties thereunder you understood that Pacific was entitled to no credit deductions on the shipments from Westvaco so long as the gypsum content equaled or exceeded 95.51 per cent, isn't that true?

A. That is correct. The contract provides for a deduction if the gypsum value falls below 95.51 per cent.

Q. From the time you went with the firm until late in 1944, Pacific did take credit deductions where the gypsum content fell below 97.51, although it exceeded 95.51, is that true?

A. There were a number of instances when such mistakes were made in the office and they have been tabulated and a check was tendered to Westvaco.

Q. When was that first brought to your attention?

A. Mr. Kaapcke in connection with this suit asked me about such deductions and whether we had made any deductions for anything other than the gypsum value percentage of whether we had made any deductions on account of the impurities, and I had a recheck made of the files, and we assembled all of these clerical errors as they were found, in instances where the clerk or clerk handling the thing have made such mistakes and issued credit memorandums and sent them a check, although we were advised by counsel that half the amount had outlawed; we nevertheless tendered a

(Testimony of C. Bruce Flick.)

check for the entire amount. It was a little over \$500. [362]

Q. Do you recall getting a letter from Mr. Watt in October, 1946, calling your attention to the fact that there was \$514 due for credit deductions that had been erroneously taken?

A. In 1946, when?

Q. The letter was dated October 31, 1946.

Mr. Bennett: Do you have the letter, counsel? I think if you have the letter it ought to be shown the witness.

Mr. Rosenberg: You have the original, Mr. Bennett.

Q. (By the Court): Do you recall such a letter?

A. At that time I remember Westvaco was asserting total claims of over \$11,000, as I remember it, on the differences and disputes over these specifications chargebacks and there well may have been such a letter. It seems to me they had the account divided into two or three parts and I told Mr. Wallace if he would show me where we were wrong we would be able to check it and correct it if we were wrong.

Q. (By Mr. Rosenberg): Mr. Flick, you visited the plant at Westvaco on a number of occasions, have you?

A. Not on a number of occasions. I have been down there several times.

Q. You have been down there when the bromine plant was operating, have you?

(Testimony of C. Bruce Flick.)

A. I was there in January, 1944, for the first time, and I am quite sure the bromine plant was in operation at that time.

Q. Is this true, that there are in effect three plants [363] comprising the entire plant down there: the bromine plant, the gypsum plant and the magnesium plant? Would you say that that is true?

A. Well, I think there is also another plant, which is advertised for sale by the Defense Plant Corporation, which was at Newark, a part of the same general plant layout, isn't that true? The Rubber Reserve Corporation contract deal?

Q. I am talking of the regular—that was a war plant, wasn't it? A. Yes.

Q. I am talking of the regular chemical plant the Westvaco had at Newark, California.

A. Yes. Now, what else may have been there I do not know.

Q. Other than what? I asked you isn't it true——

A. The plant may have included other units besides magnesium oxide, bromine and gypsum. I really do not know because I was never interested in the plant as a whole. I do not think I was ever shown the plant as a whole.

Q. (By the Court): He wants to know if those units existed down there at that time.

A. At that time those units did exist.

Q. (By Mr. Rosenberg): Was it explained to you, and you observed, didn't you, that the bittern

(Testimony of C. Bruce Flick.)

goes first to the bromine plant and the bromine is extracted, is that right?

A. That was my understanding. [364]

Q. And then the bittern goes to gypsum plant and the gypsum was taken out? A. Yes.

Q. And then the residue goes to the magnesium plant and the magnesia is extracted, is that right?

A. Yes, that chart shows it, as I understand it.

Q. That does not show the bromine operation, does it?

A. Well, the bromine operation, as I understand, has been discontinued.

Q. Do you know how many products are made down there at that plant, how many finished products by Westvaco at the Newark plant?

A. Well, as I have told you, I know the bromine and magnesium oxide and gypsum plants were there. Now, what else there may have been, like this Rubber Reserve plant, I really do not know.

Q. No. I am just speaking of those three plants.

A. I do not know.

Q. You do not know?

A. I know magnesium oxide is produced, Your Honor, in the form of what is called periclase, which is about 90 per cent magnesium oxide. I do not know what the total roster of Westvaco's products might be.

Q. In other words, this magnesium oxide, that is merely a chemical term, but the actual commercial product that comes out of the plant is in numerous and various forms, isn't it? [365]

(Testimony of C. Bruce Flick.)

A. I do not know.

Q. You do not know?

A. I understood that periclase was certainly the chief product.

Q. Let me ask you this: I believe you stated—if I am incorrect you tell me—that one of the considerations which cause you to conclude that gypsum is a byproduct is that the quantity of gypsum produced is dependent upon the quantity of the magnesium oxide that is produced, is that right?

A. That is a consideration, a definite characteristic of a byproduct is that it is something which is produced incidental to the production of the main product, and oftentimes as a result of removing an impurity from the main product or removing, in examples we have used, the hull of the pineapple or taking the pits out of the peaches and what not. In this case, I understand that the gypsum results from removing the sulphate impurities.

Q. And your assumption is that the removal of the gypsum is incidental to the ultimate production of the magnesium oxide, isn't that correct?

A. I understand that if you do not get those sulphates out you won't get a pure magnesium oxide.

Q. And that the gypsum is produced as an incidental operation in the manufacture of what I presume you would call the main product, magnesium oxide, isn't that right?

A. You have to get the sulphates out, and you get them out by [366] means of precipitating the gypsum.

(Testimony of C. Bruce Flick.)

Q. And therefore you have assumed and conclude that the amount of gypsum that you produce is dependent upon the amount of the main product, as you call it, magnesium oxide that is produced, is that true?

A. Let me put it this way: The amount of gypsum that is produced, as I understand it, is dependent upon the amount of sulphate that you have got to get out and the amount of sulphate that you have to get out is dependent on the quantity of bittern you process, and in 1943 I understood that Westvaco changed from using calcined shells, to make the calcium hydroxide shown in the lower left corner of the chart, and used a calcine dolomite, which contains a substantial portion of magnesium, and when they made that change they could get their magnesium oxide with less bittern water, therefore less sulphates to be removed, and therefore our tonnage of gypsum dropped 7,500 tons or 23 per cent in the year 1943. That shows the byproduct nature.

The Court: We will take a recess.

(Recess.) [367]

Q. (By Mr. Rosenberg): Mr. Flick, I just want this in the record in a general way; it is true, is it not, that in taking these credit deductions under the provisions of paragraph 5 of the contract Pacific likewise has taken deductions on a fractional basis when the gypsum content fell below 95.51: in other words, if the gypsum content fell below 95.51 you—and in those instances also where Pacific took

(Testimony of C. Bruce Flick.)

credit where it was above 95.51, you would take credit for that at the rate of 10 cents per ton or fractional part thereof for each per cent or fractional part that the gypsum content fell below 95.51 per cent?

A. I believe you stated that correctly. We have followed the percentage below 95.51—let us say it is $11\frac{1}{2}$ per cent below. Ten at 10 cents a ton you would multiply by $11\frac{1}{2}$ per cent.

Q. I think you are mistaken.

A. I believe you said what we do.

The Court: In the event it went the other way.

A. You are not entitled to any deduction above, Your Honor. Only if it falls below 95.51—if it was 94.51, then you would be 1 per cent below and we would charge 10 cents a ton.

Mr. Rosenberg: Let me ask this question: If it falls under 94.51 per cent you charge 10 cents a ton for the 3 per cent that it falls below 97.51?

A. Yes.

Q. And although it may surprise the Court, we don't question [368] the correctness of that—the contract provides that we have a 2 per cent tolerance, but if we exceed that 2 per cent, they are entitled to 10 cents per ton credit for each per cent that the gypsum content falls below the chemical content of 97.51. The only difference between us in that respect is we question their right to take fractional parts and Pacific is claiming the right to take fractional parts.

The Witness: That's right.

(Testimony of C. Bruce Flick.)

May I correct—I am not familiar with the procedure, but I would like to correct an answer I made just before the recess.

Q. All right.

A. With respect to the word “residue.” You asked me about after we took, after the gypsum was taken out and the residue going on to the magnesium oxide process, I believe I said yes. I don’t mean to use that word “residue”——

Q. No, I understand.

A. ——because it is not residue but it has magnesium chloride in it from which the major product magnesium oxide is obtained in the next step. I want to correct that word residue.

Q. What you meant is the fluid remaining after this gypsum is extracted goes on to——

A. The fluid containing the magnesium chloride is the thing from which the magnesium oxide is obtained in the next stage. [369]

Q. In other words, at this point the magnesium sulphate which is a bittern water——

A. It is not the bittern itself, it is in the water.

Q. It is in there. Calcium chloride is added and the gypsum is taken off; is that right?

A. When you add calcium chloride to magnesium sulphate, both those chemical compounds break down and recombine or regroup, so that you then have magnesium chloride and calcium sulphate.

Q. This is the fluid that goes on into the chemical plant from which the magnesia is extracted (indicating on diagram).

(Testimony of C. Bruce Flick.)

Mr. Bennett: When you say "this"—

Mr. Rosenberg: The magnesium chloride—

A. (The Witness): Magnesium chloride is in the fluid that goes on to the next stage.

Q. Assuming that we would discontinue the process at this point for the reason there was no market for magnesium products and we discontinued the process at the point where the gypsum is taken off. Would you still consider gypsum to be a by-product?

A. If gypsum were then the only product, obviously it could not be a by-product, but you would not do that because you could not afford it.

Q. Well, that would depend on the price of gypsum as to whether we could afford it.

A. I hope it does not go that high.

Q. As I understood your testimony yesterday, you stated that [370] one of the reasons why, in your expert opinion, overhead is not properly chargeable to a by-product is that if you discontinue the processing of the by-product, the overhead would continue and it would be impossible to directly ascertain the overhead charges that were caused by the processing of the gypsum. Is that true? Let me read your testimony. This is what you said:

"Now we come to indirect or overhead charges. Those charges, those overhead charges which you would have anyway, whether you processed the material or whether you dump it in the Bay, those charges which you cannot directly ascertain were

(Testimony of C. Bruce Flick.)

caused by this processing of that by-product, those charges are not properly chargeable."

Do you recall giving that testimony?

A. Yes; I think that is a very good statement.

Q. If I understand that testimony, one of the reasons why you said that, in your expert opinion, and as a matter of good accounting, it is not proper to charge overhead expense to processing of a so-called by-product, is that if you did not process the by-product, the overhead would continue anyway and it would be impossible to determine how much of the overhead charge directly attributable to the processing of the by-product; is that a correct statement?

A. Correct.

Q. Wouldn't that same principle apply in the case of a joint [371] product?

A. No.

Q. Let me put it in this manner: If you are making four joint products in a plant and as you have stated before you charge certain charges which you allocated as overhead and which can not be directly attributable to the various products that you manufacture and because of unprofitableness you discontinued the manufacture of one of those products, your overhead would continue, would it not?

A. Yes, but the situation is entirely different. Let me explain, in the case of joint products—let's go back to our Gerlach, Nevada plant where we have four products, we call joint products. If you discontinue one of the four products then you have three joint products. Now, at this plant if you dis-

(Testimony of C. Bruce Flick.)

continue drying, grinding and shipping this by-product material which comes off the filter, it is the filter cake, and you throw it into the Bay, why, you still are making your major products. The essential difference in accounting between by-product and joint product is that characteristic of the by-product: it is a valueless waste until you have processed it and put it in form where you can get something for it.

Q. Is that true of any raw material?

A. No.

Q. For all practical purposes? A. No.

Q. It is a valueless waste? A. No.

Q. Until you make something marketable out of it?

A. No. Our gypsum, as we get it from the quarry is not at that stage a valueless waste.

Q. Where does it change the logic of your accounting? Let me ask this: Is this true, that if you discontinue in your Gerlach plant one of the four products that you are making, you would continue to have overhead expense.

A. You would then have three joint products and you would spread against those three joint products the cost of making your three products. Now, I don't want to quibble over the word "overhead", but I presume you are talking now about charges right at that plant.

Q. That's right. Then if you were only making three products the overhead that you had before to spread against four products, you have to spread it over the three products. A. Sure.

(Testimony of C. Bruce Flick.)

Q. Why is the philosophy or the rationale or logic any different in that case than in the case of a by-product, where does that change the logic?

A. There is a very definite difference in the logic. When we quarry the rock at Gerlach there is never a point at which that rock can be called a waste material. We crush the rock. Then we can make either agricultural gypsum or hard wall plaster [373] or stucco, or we manufacture the wall board, or we can sell it as a cement retarder. There is never at any stage anything that you can call a waste material. You don't have to pull anything, any impurity out of the rock. You don't have to peel anything off the rock. When you come to a typical by-product, and this is really the heart of the logic, your typical by-product is a material which is both incidental to the production of a major product and the by-product material typically a valueless waste until you have done something to it.

Let me answer this question further as to your by-product. One school of accounting says simply credit the proceeds of the sale of the by-product against the cost of the main product, but where you have to process the by-product you charge only what you are actually out of pocket to do what is necessary to give that waste material a market value. That is the logic underlying the accounting practice.

Q. Do you think there might be some distinction in cost accounting in a chemical plant as dis-

(Testimony of C. Bruce Flick.)

tinguished from other manufacturing operations where you start with something that has intrinsic value in itself, like gypsum, can you conceive of any difference in the treatment by reason of the difference in the nature of the industry?

A. I don't see any reason why there should be any different treatment in accounting for by-products in one kind of industry and another kind of industry. It does not hang on the kind of [374] industry. It hangs really on the nature of the by-product.

Q. You have been over at the plant. This is true, that the mother material in which all of these processes stem or from which they stem, is the bittern, isn't it? A. The mother material?

Q. Answer "yes" or "no".

A. I can not answer "yes" or "no" because the wording of the question, you say from which all these products stem.

Q. Yes.

A. The gypsum is not a product which stems from the mother material. The gypsum is an impurity in the mother material, it must be gotten out.

Q. It is in the mother material.

A. The sulphate is, the calcium part is not in the mother material.

Q. In all the processes at this plant they start with the bittern?

A. Yes. That is the first thing—

(Testimony of C. Bruce Flick.)

Q. And the bittern is nothing but salt water from which the Leslie Salt Company has precipitated the salt; isn't that right?

A. That is as I understand it. Under that precipitation and other chemical effects, it is concentrated bittern water and it reaches that condition in connection with the magnesium sulphate which is not characteristic, as I understand it, of the unconcentrated sea water. [375]

Q. Well, we start with the bittern, which is the sea water after the salt has been taken out.

A. I would call it concentrated sea water after the salt, most of the salt, has been taken out. There is still, I think, quite a bit of salt in it.

Q. As a matter of fact, that bittern itself is a sea water which the Leslie Salt Company produces?

A. I suppose you might call it so.

Q. Well, do you have any doubt about it?

A. I don't know anything about Leslie Salt Company's process.

Q. You are starting here with a material which is, you might say, a chemical substance from which a chemical plant is going to extract various chemical elements.

A. That is true, but I don't know why the word chemical has any magic. It is merely sea water.

Q. Well, I am impressed by the magic which you apply to the word "by-product". How do you figure—

A. I have explained that.

Mr. Bennett: Your Honor—

Mr. Rosenberg: I withdraw it. I withdraw the statement.

(Testimony of C. Bruce Flick.)

Q. So that the fact of the matter is that in the chemical operation of this kind you start with a mother material and then with the combination of other chemicals you extract various chemical elements from the material as it proceeds through the various processes; is that right? [376]

A. You start with the bittern water which contains two chemical compounds, two magnesia compounds, you have to do that in order to get magnesium oxide.

Q. Can't you just as well say that it also contains sulphates that you are anxious to get out as gypsum?

A. It contains an impurity which you must get rid of to get your magnesium oxide.

Q. It is a fact, is it not, there is quite a substantial physical plant over there that is devoted exclusively to the grinding, filtering and drying and processing of the gypsum; is that true?

A. Well, what you mean by the words "quite a substantial plant", I don't quite know.

The Court: Well, there are three units over there and one of the units is for gypsum.

A. That is true, your Honor. The gypsum unit is not a big unit in a manufacturing sense of the term.

The Court: In any event, there are three units and one is a gypsum tank, a gypsum unit.

A. Yes, your Honor.

Mr. Rosenberg: Q. Mr. Flick, I show you an article entitled "Bromide, Lime, Magnesia, Gyp-

(Testimony of C. Bruce Flick.)

sum." The article is from the "Pacific Chemical and Metallurgical Industry," October 1938. It is divided into four sections. The first one is bromide. The second one is lime. The third one is magnesia [377] and the fourth is gypsum. I direct your attention to these pictures opposite the article on gypsum. Do you recognize that as being the gypsum plant of the Westvaco Chloride Products Corporation at Newark, California?

A. I can not tell from these pictures. It might be most any kind of plant. The tanks in the middle look like the slurry tanks at Permanente. I am sorry, I can not identify industrial pictures like that.

Q. But you have seen the plant there. There are precipitation tanks, there are mixers, there is a grinding machine, there is a filter and there is a drying kiln; is that right?

A. The precipitation tank, you have described certain pieces of equipment, they are not all part of the gypsum unit.

Q. Well, the tanks are tanks in which the gypsum is precipitated?

A. As I understand it, they are tanks in which this liquid sort of settles and the chemical reaction goes on, it is in the tank and there is air bubble agitation and the result of all that is the gypsum crystals do form in those tanks and then it has to be filtered out for a complete separation of gypsum from the stream containing the magnesium chloride that goes on into the next stage of the manufacture of the magnesium oxide.

(Testimony of C. Bruce Flick.)

Q. Then there is equipment there for the purpose of conveying the dry gypsum from the drier over to the warehouse or to the cars for shipment?

A. Yes. You have to have conveyors, I think there is a drier, a grinder and one piece of equipment, as I remember it, one of the Raymond Kiln mills.

Q. Over to the warehouse?

A. That's right, storage bins.

Q. Do I understand that you had any question in your mind that the depreciation charged on this equipment that is devoted exclusively to processing of gypsum is a proper item to be included in the cost of producing gypsum; do you question that?

A. I don't question that. I question the method of depreciation.

Q. What method of depreciation?

A. The straight line method.

Q. Who told you that we followed the straight line method?

A. Mr. Cuneo.

Q. When?

A. January 14, 1944.

Q. Is that in your notes of your conference?

A. Yes. Would you like to see it?

Mr. Rosenberg: Yes. [379]

A. I find it here, if you would like to look at it.

Q. Just tell me what he said.

A. This is my note under the heading of "Depreciation":

"Gypsum department equipment depreciated directly. Other equipment, such as compressors, et cetera, not directly allocable is charged in ratio of

(Testimony of C. Bruce Flick.)

the plant values which are directly allocable. Composite rate, straightline for entire plant spread to departments." And a further note on depreciation: "Depreciation detail to be obtained from New York."

Q. What is your objection to the determination of depreciation on that basis?

A. On the straight line basis?

Q. Yes, the composite rate.

A. The composite rate. Let us take them one at a time. May I discuss first the straight line?

Q. Yes.

A. The straight line method of depreciation is a method which assumes that a machine will have a certain useful life in terms of years. For example, if you think that a machine will last for ten years, then you write off each year one-tenth of the cost of the machine. In the case of this by-product gypsum, where you have a fluctuating tonnage, the annual depreciation remaining under such a method practically unchanged, if your tonnage drops, the per-ton charge goes up, as actually happened in these figures from 1942 to 1943, and the result of that is [380] that your price would go up under your escalator clause and you would pay an increased price for the remainder of the 25-year contract, because of that bookkeeping method adopted of straight line depreciation. Straight line depreciation does not reflect the actual wearing out of the machine. It is only a hypothetical or theoretical, convenient method of writing it off. Now, for this

(Testimony of C. Bruce Flick.)

purpose the correct method would be the production method to estimate how many tons of gypsum that machine should be good for, and then to divide the cost of the machine by the number of tons to be put through it, and arrive at a depreciation rate per ton.

Q. Do you have any way of knowing whether what you call the straight line depreciation has resulted in any higher rate of depreciation than would result in the tonnage method that you suggest we employed?

A. I have just told you it resulted in a 7-cent increase from 1942 to 1943, where if the depreciation were on a per-ton basis such an increase would not have appeared. There was no actual increase in the cost of manufacture of the by-product gypsum of 7 cents a ton in those two years. The machines did not wear out faster because less tonnage went through them. It is a bookkeeping thing that has a result that is apparent rather than real.

Q. That is a common method of determining depreciation, isn't it? [381]

A. Quite common. I merely point out that it does not work fairly here, or correctly, rather.

Q. Let us go into insurance. Do you question the propriety of including in cost of production the expense of insuring the plant that is devoted to the production of gypsum?

A. I will say "Yes," and then if I may explain my answer a little bit, I have taken the view, and

(Testimony of C. Bruce Flick.)

I believe I have expressed it, that in my opinion, by its nature—I am speaking now of property insurance, such as fire insurance—is that what you mean?

Q. Yes.

A. Fire insurance, for example, by its nature, is essentially protection to the company in case anything happens to the equipment and as a financial protection sort of item I do not believe that it should be included in actual cost of manufacture. But I am quite prepared to say that if the amount of fire insurance carried on those machines, that equipment, directly in the gypsum department, can be ascertained directly, that I would not quarrel over its inclusion.

Q. And I presume you would concede the same with reference to taxes that could be related to the equipment that was used in the production of gypsum, would you, property taxes?

A. Property taxes—again I feel that the best construction would be, inasmuch as taxes are levied by outside taxing authorities, you cannot control the amount of the assessment, [382] the tax rate, or anything else. I think they are a financial expense item rather than actual cost of manufacture. But, again, I would not battle very hard to say that you were entirely wrong if you included in the cost of the by-product those property taxes which you can actually ascertain to be levied against the equipment used in the production of that by-product. I do not think that is the best—

(Testimony of C. Bruce Flick.)

as I say, I really think it is a financial expense rather than an actual cost of manufacture. It is not directly related to drying, grinding and shipping gypsum.

Q. If you were called into a plant as an expert accountant and they asked you to tell them how much they had to sell their product for to operate at a profit, I think you would include taxes in your computations, as well as insurance and depreciation, wouldn't you?

Mr. Bennett: I object to that question because it is irrelevant and immaterial. The contract that we are dealing with here uses certain terms, "cost of production," and "actual advance in cost of manufacture." This question of counsel, as I understand it, has to do with profit, which according to his theory has all kinds of things in it, and as I said in my opening statement, what system might be designed by an individual for its own purposes to figure his gross, net, intervening or intermediate profit—

The Court: I think the question here is whether or not [383] the item of taxes is attributable to overhead expense. Is it or is it not?

Mr. Bennett: Whether it is attributable to overhead?

The Court: Yes.

Mr. Bennett: Any question your Honor asks, of course, I won't object to. But I did not understand that that was counsel's question.

The Court: I want to ask that.

(Testimony of C. Bruce Flick.)

The Witness: I believe that taxes are quite commonly looked upon as a part of overhead, although they are really a separate item, to-wit, taxes.

The Court: Q. And insurance the same?

A. Insurance likewise.

The Court: Let us proceed, gentlemen.

Mr. Rosenberg: Q. Referring your attention to Plaintiff's Exhibit 10, which is the letter of September 13, 1946, which is the notice of the increase of price to \$4.62—I believe you have testified that you received that and then shortly thereafter you sent Mr. Bannard over to Newark to inspect the records over there, is that right, Mr. Flick?

A. Yes.

Q. And then Mr. Bannard spent some time over there inspecting records, did he?

A. I think he spent several days.

Q. Then when he came back he reported back to you, did he? [384]

A. That is correct.

Q. When he came back did he show you a tabulation such as the one that I now hand to you, showing the derivation of that 86-cent increase in price?

A. He may have. I can't too definitely say, because he made working papers, and I reviewed with him his working papers, you see, and I may have seen this incident to that.

Q. Ultimately, after Mr. Bannard had conferred with Westvaco and then had consulted with you, and I believe you said that there was some further conferences had, were you ultimately given

(Testimony of C. Bruce Flick.)

a revised tabulation showing a 72-cent increase in cost of production, and a resulting price of \$4.48?

Mr. Bennett: You mean given by the defendant, your client, Westvaco?

Mr. Rosenberg: Yes.

Mr. Bennett: What you mean by that was—

Mr. Rosenberg: Was he furnished with this?

Mr. Bennett: The first claim, the first sheet that you showed the witness—

The Court: It was revised. This is the second.

Mr. Bennett: The claim, the basis of their 86-cent price increase—

The Court: It was revised to 72.

Mr. Bennett: The second sheet was a revised compilation of the same nature showing a reduction to 72 cents, both of [385] which sheets or documents were furnished by the defendant and represented the nature of their claim for the advance, is that right?

Mr. Rosenberg: That is right.

The Witness: I remember that there was at first a correction of 14 cents and this seems to reflect that. I can't be sure of all these detailed figures.

Mr. Rosenberg: Q. But you have a copy of that haven't you, Mr. Flick?

A. Probably. If Bannard had it, it is probably in his files. I remember that there was a correction of 14 cents after the initial increase.

Mr. Rosenberg: Is there any objection to this, Mr. Bennett?

Mr. Bennett: Not for the limited purpose of showing what you claimed.

(Testimony of C. Bruce Flick.)

The Court: Let it be marked and limited to that purpose, then.

(The document referred to was thereupon received in evidence and marked Defendant's Exhibit C.)

DEFENDANT'S EXHIBIT C GYPSUM PRODUCTION COSTS

Production	July 1944—June 1945		July 1945—June 1946	
	Cost	Per Ton	Cost	Per Ton
	33,420 tons		36,658 tons	
Supervision	\$ 1,169.82	\$.04	\$ 1,588.37	\$.04
Operating Labor	10,622.12	.32	12,772.31	.35
Operating Materials	791.63	.02	1,790.28	.05
Repair Labor	7,101.88	.21	9,027.88	.25
Repair Materials	3,841.85	.11	7,438.34	.20
Truck & Tractor	85.41	....	.....	....
Miscellaneous	.....	....	9.00	....
Power	4,823.35	.14	5,216.83	.14
Fuel Oil	71.31	....	219.77	.01
Fuel Gas	3,246.42	.10	3,992.94	.11
Bittern	5,854.23	.18	5,794.88	.16
Sulphuric Acid	.....	....	12,979.42	.35
Water & Steam	513.29	.02	565.36	.02
<hr/>				
Total Direct	\$38,121.31	\$1.14	\$61,395.38	\$1.68
Overhead	24,957.64	.74	32,386.87	.88
Taxes, Insurance & Deprec.	13,918.54	.42	14,134.38	.39
I.D.C. Water Steam	259.26	.01	242.47	.01
<hr/>				
Total Mfg.	\$77,256.75	\$2.31	\$108,159.10	\$2.96
Loading & Ship- ping Expense	7,091.81	.21	10,427.61	.28
<hr/>				
Total	\$84,348.56	\$2.52	\$118,568.71	\$3.24*

* Increase \$0.72.

(Testimony of C. Bruce Flick.)

Mr. Rosenberg: Q. You sent Mr. Bannard over after being notified of this 86-cent increase for the purpose of investigating the propriety of that increase, did you?

A. Looking at the figures to see whether it appeared to be supported.

Q. Did you give him any instructions as to what items he was [386] to allow or disallow? I mean did you give him any general instructions such as nothing but direct charges, or anything of that sort?

A. Bannard's job was not to allow or disallow anything. Bannard's job was to go down, look at the figures, and come back and tell me what he found.

Q. Wasn't it his job to make work sheets which would include adjustments that he felt should be made in the claimed increase cost of production? Wasn't that what he was supposed to do?

A. Bannard was thoroughly familiar with my position in respect to all of these accounts, and his job was to go down, look at the figures, and come back and report to me. Bannard was auditor, and by that time I had become vice-president.

Q. What I am trying to find out is this: Before he went over to Newark and inspected the records, did you tell him, "Now, look over those records and keep in mind that we claim under the contract there are to be only direct charges allowed in determining cost of production?" Did you tell him anything of that sort?

(Testimony of C. Bruce Flick.)

A. I let Bannard look at my notes from my previous examination and sent him down there to look at the figures and use his judgment. He was a certified public accountant, and I dependent on his judgment as to how far he was going to go in looking at the figures.

Q. At any rate, he did work up a work sheet on which he set [387] forth the items as set forth by Westvaco, for the period in question, and those that he approved and those which he objected to, did he not?

A. Whatever work sheet Bannard may have had did not represent any final judgment by Mr. Bannard as to what he approved or did not approve. His work sheets were to enable him to report to me.

Mr. Rosenberg (To Mr. Bennett): You know what this is (handing a document).

The Witness: If you want to know what Bannard approved, he approved my letter of November 4, 1946, which he read before I sent it.

Mr. Rosenberg: Q. You are a little ahead of me. You have a copy of this work sheet in your files, haven't you?

A. I must have if this is a photostatic copy of one of Bannard's work sheets.

Q. That is a sheet he prepared after he spent several days over at Newark going over the records over there, is it? A. Yes, sir.

Q. And that work sheet is based upon the figures comprising this 86-cent increase that was

(Testimony of C. Bruce Flick.)

ultimately modified down to 72 cents, isn't that right? A. I think it must have been, yes.

Q. Where did he make this work sheet? Did he make it over at the plant, or after he got back and reported to you, do you [388] know?

A. I do not know.

Mr. Rosenberg: I will offer that in evidence, if the Court please.

The Court: Let it be admitted and marked.

Mr. Bennett: Your Honor, what is the purpose of it?

Mr. Rosenberg: The purpose of it is to show that after this—

(Testimony of C. Bruce Flick.)

(To the Witness): What was Mr. Bannard's position at that time?

The Witness: Mr. Bannard was auditor, working under me and responsible to me.

Mr. Rosenberg (Continuing): —that after the auditor made his investigation, setting forth in his work sheets the items to which he took exception, there is no exception taken to general overhead, and still on November 4, 1946, Mr. Flick wrote a letter, which is in evidence, in which he stated, "Items questioned by our auditor are as follows:" And one of the items that Mr. Flick said in this letter that his auditor questioned was general overhead, and his own work sheet is to the contrary.

Mr. Bennett: Your Honor, I do not see on this work sheet where any such conclusion is deductible. May I also say as part of my objection to your Honor, and basing it on the premise that counsel has stated, that it is incompetent, irrelevant and immaterial, and no proper or adequate foundation has been [389] laid, and it shows on its face that it does not include any such thing. The testimony of this witness offered to lay the foundation shows that Mr. Bannard did not have permission or the function of determining whether or not overhead should be included. That was a matter handled by Mr. Flick, and upon which Mr. Flick had unequivocally stated and addressed himself to the defendant and that Mr. Bannard's work was simply to gain and ascertain from the statements and records that were furnished to him by Mr. Williams,

(Testimony of C. Bruce Flick.)

or whoever it was in charge of the Westvaco plant, the figures that they claim constituted increased cost, the cost, and prepare the accounting data for Mr. Flick's information. Now, I do not see, even assuming that this particular work sheet does not contain any specific protest that overhead items should be disallowed, constitutes any evidence in this case upon any foundation that has been laid so far or apparent from the face of the document. For that reason it seems to me the document is inadmissible and does not serve nor can it serve the purpose for which counsel says it is being offered in evidence.

Mr. Rosenberg: I will submit that that probably goes to the weight of the evidence rather than its admissibility, if the Court please.

The Court: The objection in any event will be overruled. Note an exception.

Mr. Rosenberg: I see it is after four. Does your Honor [390] want to adjourn now?

The Court: We will adjourn this case to Tuesday, at ten o'clock, inasmuch as we have a law and motion calendar on Monday. That will give both sides a full opportunity to come in well prepared so we will not have any difficulty at all here.

(Thereupon an adjournment was taken until Tuesday, December 16, 1947, at 10:00 o'clock a.m.)

[390-a]

Tuesday, December 16, 1947, 10:00 o'clock a.m.

The Court: Proceed, counsel.

C. BRUCE FLICK,

resumed the stand.

Cross Examination—(Continued)

Mr. Rosenberg: Q. Mr. Flick, on Friday we were talking about the payment of this \$2.98 price, and I asked you if it was true that later in the year there was an agreement in letter form between the companies whereby Westvaco agreed that it would not avail itself of the escalator clause for a period of approximately a year, and you stated that that was true. I incorporated in my question the fact that as part of that agreement Pacific agreed that during that year period it would pay the \$2.98 price; that is correct, isn't it?

A. I believe that is correct.

Mr. Rosenberg: The other day Mr. Kaapcke read into the record, if the Court please, certain payments—this appears at page 256 of the transcript—apparently I haven't the correct transcript reference here.

The Court: Counsel has it.

Mr. Kaapcke: I have "256" noted here. I did not check your transcript. I checked the figures you wanted to put in the record.

Mr. Rosenberg: At any rate, at some point in the transcript [391] counsel read off the payments that had been made by Pacific to Westvaco. During the latter period of 1946 certain payments had been made at the price of \$3.76 a ton, and then I think three payments that had been made at \$4.48

(Testimony of C. Bruce Flick.)

a ton. I called counsel after Court, or called him Saturday, rather, and directed his attention to the fact that in connection with those payments that we made at the price of \$4.48 per ton, prior to the commencement of this action, that Westvaco had made a refund by way of a credit memo. to Pacific at the rate of 12 cents a ton on all of those payments that were made prior to suit at the price of \$4.48 a ton; so that the net result is that rather than having paid at the rate of \$4.48 per ton, Pacific paid at the rate of \$4.36 per ton.

Mr. Kaapcke: That is correct.

Mr. Rosenberg: That arises out of this fact, your Honor, that, as has been stated, since the commencement of the action Pacific has found that it made an error of 12 cents per ton, whereas in our answer we set forth we are entitled to \$4.48 a ton. We have conceded we are entitled only to \$4.36 per ton. Therefore, since the suit was commenced we refunded to Pacific 12 cents per ton on all shipments for which they paid the price of \$4.48 per ton.

Mr. Bennett: That is right. I think there was a slight inadvertence. I think you said Pacific discovered that it made an error. [392]

Mr. Rosenberg: No, Westvaco discovered that it made an error, that is right, and that is the price we are claiming in this action, your Honor, \$4.36 a ton, although your pleading sets forth \$4.48 a ton.

Q. Mr. Flick, you have testified that under date of September 13, 1946, Pacific transmitted two let-

(Testimony of C. Bruce Flick.)

ters under the same date to Westvaco. Do you recall that? A. Yes.

Q. I believe they are in evidence as Exhibits 11 and 12. I will show you what purports to be a copy of a letter written to you under date of September 23, 1946, by Westvaco Chlorine Products Company, signed by W. K. Wallace, Western Manager, and ask you if you received the original of that letter.

A. I received a letter dated September 23, 1946, from Westvaco, and this does look like a copy of it. I have the original.

Mr. Rosenberg: Do you have the original, Mr. Bennett?

Mr. Bennett: I do not know, but we will not raise the question at this time as to it not being the original, counsel.

Mr. Rosenberg: I offer this as defendant's exhibit next in order.

The Court: It may be admitted and marked.

(The letter referred to was thereupon received in evidence and marked Defendant's Exhibit E.) [393]

Mr. Bennett: The purpose in offering this letter, Counsel, is merely to show the position stated or claimed by your client at the time this letter was written?

Mr. Rosenberg: That is right. This letter is dated September 23, 1946, addressed to Pacific Portland Cement Company, 417 Montgomery St., San Francisco, California, Attention: Mr. C. B. Flick:

(Testimony of C. Bruce Flick.)

“Gentlemen:

We have received two letters from you, both dated September 13, 1946, and both stating that they record an understanding between Pacific Portland Cement Company and Westvaco Chlorine Products Corporation.

This letter will advise you that neither of these letters outline an agreement which this Corporation has made with Pacific Portland Cement Company. In connection with the various statements made in these letters, we have the following comments:

Your First Letter dated September 13, 1946, being the Longer of the Two Letters:—”

Mr. Bennett: I think that letter was withdrawn, wasn't it, counsel?

Mr. Rosenberg: I think they are both in evidence as Exhibits 11 and 12.

Mr. Bennett: The second or shorter letter superseded the first. I did not recall that I offered the long one, because it was completely superseded.

Counsel is right. Both letters, the long one, which is superseded, being Plaintiff's Exhibit 11, and the shorter one that superseded Exhibit 11, being Exhibit No. 12, are in evidence. I was mistaken in my recollection.

Mr. Rosenberg: (Continuing reading):

“1. Sacking Gypsum

We agree with you that we have had an agreement with you for the sacking of gypsum which was extended to August 31, 1946, and that the

(Testimony of C. Bruce Flick.)

agreement with you for sacking gypsum, as extended, expired on August 31, 1946. We further agree that we have no interest in sacking small quantities of gypsum for you and that effective August 31, 1946, we had no gypsum deliverable to you under our contract of January 29, 1937.

“2. Price of Gypsum

We agree with you that by letter dated July 24, 1945, it was agreed between the two corporations that the price at which this Corporation would sell to your Corporation, and your Corporation would buy gypsum until July 31, 1946, under our contract of January 29, 1937, was Two and 98/100 (\$2.98) Dollars per ton, F.O.B. plant, and that the so-called escalator clause in said contract which contemplates change in the price of gypsum from time to time should not be operative at any time before July 31, 1946. We further state that said agreement provided, in addition, [395] that after July 31, 1946, said escalator clause should be fully operative in accordance with the terms of the contract. We deny that there is any agreement, oral or written, between Mr. W. K. Wallace of our Corporation and Mr. C. B. Flick of your Corporation to extend said agreement of July 25, 1945, with respect to the contract price for gypsum to September 4, 1946, or beyond July 31, 1946. Rather, we state that we have no additional agreement with you with respect to the price of gypsum for any period after July 31, 1946, and that after said date the contract price with respect to all gypsum

(Testimony of C. Bruce Flick.)

delivered to you is determined by our contract of January 29, 1937, except insofar as gypsum is subject to Government laws or regulations restricting the selling price. We further state that insofar as gypsum has been decontrolled by the Office of Price Administration, that the contract selling price until November 13, 1946, is Three and 76/100 (\$3.76) Dollars per ton, F.O.B. plant, and that thereafter the selling price of all such gypsum shall be Four and 62/100 (\$4.62) Dollars per ton, F.O.B. plant, in accordance with the letter of W. K. Wallace to you dated September 13, 1946.

3. Deductions for Gypsum Below Specification.

We have no agreement with you with respect to deductions which you have made because of credits you have taken in [396] connection with so-called moisture credits. On the contrary, we assert that the deductions which you have made from our invoices are not authorized by the terms of the agreement dated January 29, 1937, and that the deductions you have made with respect to shipments of gypsum made after September 8, 1944, are not authorized by the express terms of the agreements dated September 8, 1944, and July 25, 1945.

4. Right to Refuse in Excess of Two Thousand Tons in Any Month.

In answer to the above-entitled paragraph in your letter, we agree with you that in any calendar year in which you do not exercise your right to refuse to purchase and accept in excess of twenty thousand tons of our gypsum production for the succeeding calendar year, that you are bound to

(Testimony of C. Bruce Flick.)

purchase our entire production of gypsum deliverable to you in such year when offered to you in approximately equal monthly installments.

Your Second Letter Dated September 13, 1946, Being the Shorter of the Two Letters.

1. Bagging Gypsum.

Our comments with respect to this paragraph in your letter which substantially restates the first paragraph of earlier letter are set forth above.

2. Price of Gypsum.

In connection with this paragraph in your letter, we do not agree with the averments made by you and our contentions [397] with respect to these statements are set forth above. We note your comments with respect to the price to be charged you for the gypsum delivered to you under our contract of January 29, 1937, and this will advise you that we will charge you the contract price of Three and 76/100 (\$3.76) Dollars per ton, F.O.B. plant, for all gypsum delivered to you until November 13, 1946, and thereafter will charge you Four and 62/100 (\$4.62) Dollars per ton, F.O.B. plant, for all such gypsum, in accordance with the terms and conditions of our agreement with you, and our notice to you dated September 13, 1946. We do not understand your comment with respect to the use of the price of Three and 76/100 (\$3.76) Dollars as a base for upward adjustment of the price of gypsum in the future under paragraph 6 of our agreement and state that we will determine the selling price of gypsum in accordance with the terms and conditions of the agreement. We

(Testimony of C. Bruce Flick.)

further state that we do not recognize any right in you in question at this time the price of Three and 76/100 (\$3.76) Dollars per ton currently payable by you under the contract. You have the right to inspect our books of account and records showing the production cost of gypsum to confirm the correctness of the advance in price of eighty-six (86c) cents per ton, making an aggregate purchase price of Four and 62/100 (\$4.62) Dollars per ton, F.O.B. plant, [398] payable by you for gypsum delivered on and after November 13, 1946.

It is our belief that the differences which exist between us should be settled amicably. However, in connection with such a settlement, we demand payment of all amounts due us by reason of the unauthorized deductions you have made from our invoices. We stand ready to meet with you at any time in an effort to work out a fair and equitable settlement of the differences which exist. However, neither of the two letters which you have submitted to us dated September 13, 1946, represent a satisfactory settlement as far as this corporation is concerned.

“Yours very truly,

Westvaco Chroline Products
Corp.

By W. K. Wallace,
Western Manager.”

Q. It was following the receipt of that letter that you sent Mr. Bannard to Newark for the pur-

(Testimony of C. Bruce Flick.)

pose of inspecting the records and determining the correctness of the 86-cent price increase, is that correct, Mr. Flick?

A. I sent Bannard to Newark to look at Westvaco's figures, get information, and come back and report to me. He did not go to Newark for the purpose of questioning the 86 cents.

Q. He did, however, prepare this work sheet which has been introduced in evidence as Defendant's Exhibit D, did he not?

A. May I see the work sheet? [399]

A. Yes, Bannard prepared the work sheet.

Q. On this work sheet he compared the periods July, 1944, to June, 1945, with July, 1945, to June, 1946, is that correct?

A. Yes, he shows the figures for those periods.

Q. What he did is set forth in the left-hand column the various items of cost of production of gypsum as shown in the records of Westvaco, did he?

A. I understand that is what he did.

Q. And then in the first column for each period he put the figure in there, "per Westvaco," did he?

A. That is correct.

Q. In the second column he put "adjustment," is that correct?

A. Correct.

Q. And in any instance in which he disagreed with the item he put in the amount he figured it should be, is that right?

A. I wouldn't say where he disagreed, no.

Q. What do you mean by "adjustment"?

(Testimony of C. Bruce Flick.)

A. Those adjustments which appear here are adjustments which were obvious, which should be made without any question of going into the fundamental correctness or incorrectness of Westvaco's accounting methods. These are adjustments which would be obvious, no matter what general accounting method was followed by Westvaco. Do I make it clear?

Q. Let me see if I can make it clear. At any rate, the items that appear in the second column headed "Adjustment" are items [400] which he in his opinion felt should be adjusted, is that right, whether exclusive or not?

A. The adjustments which appear there are items which Bannard felt should be adjusted.

Q. And then in the third column, which is headed "As adjusted," is the final figure, and in the cases which there is nothing in the second column he repeats the Westvaco figure in the first column, and where he has made an entry in the second column under the heading "Adjustment," he has adjusted the figure in the third column accordingly, is that right?

A. That is right. The third column, which is headed, "As adjusted," represents Westvaco's book figures with those particular adjustments which appear here, again without questioning the basic accounting methods or principles. I do not know if I make myself clear on that.

Q. I think the sheet is clear.

A. For example, if you look at my sheets for

(Testimony of C. Bruce Flick.)

1943 you will find no adjustments. That does not mean I accepted all of Westvaco's figures.

Q. You had no claim for adjustments on your sheets, did you? A. No.

Q. Is this true——

A. I just do not want anything read into an ordinary audit work sheet, that is all.

Q. I am not reading anything into this, Mr. Flick, I assure [401] you. I am going to read just what is on the face of it. In the third column he has, "Increase or decrease per ton," and then he has in column 1, "Per Westvaco," No. 2, "As adjusted, No. 3, "Adjustment." Is that right?

A. Yes, that is just the subtraction.

Q. It is a recapitulation?

A. Just a subtraction of the first two columns.

Mr. Rosenberg: When I was asked the other day what the purpose was of offering that, I stated that there was no adjustment made in general overhead on this sheet, and Mr. Bennett took exception to that. He said that that was not true, and that there was nothing on the sheet to show that.

Q. I will ask you if it is not true that under the item, "General overhead," that in this final column it shows, "Increase per Westvaco 7 cents, adjustment"—— A. 7 cents?

Q. And the amount of adjustment nothing, is that right? In other words, he made no adjustment in general overhead, did he?

A. He did. He wiped out the 7 cents.

Q. He did wipe out the 7 cents? A. Yes.

(Testimony of C. Bruce Flick.)

Q. How much has he got in the column "Adjustments"?

A. In the column "Per Westvaco" 7 cents. Westvaco showed an increase from 37 cents to 44 cents. [402]

Q. That is right.

A. Or an increase of 7 cents.

Q. Yes.

A. As adjusted 35 cents, 42 cents—no, that is correct. These figures do not reflect any adjustment.

Q. So the statement I made is correct, is it not, that on this sheet Mr. Bannard did not make any adjustment in general overhead expense—on this sheet, is that true?

A. Apparently it come out that way in the net total, but he has numerous adjustments in the detailed accounts comprising the general overhead.

Q. He does? A. Yes, sir.

Q. What adjustments has he got in items comprising general overhead?

A. Well, now, in these items which Westvaco listed as part of general overhead, the first adjustment is in Mine management, which in his adjustment column he threw out altogether.

The next adjustment is in an account for exploration, which he threw out altogether.

The next adjustment is in subscriptions and donations, which he threw out altogether.

Q. How much did he throw out for each of those three items you mentioned?

(Testimony of C. Bruce Flick.)

A. He threw out the amount which appears in each of these [403] two periods opposite Mine management. In the first accounting period there was \$311.08, and he wiped that out; and in the second accounting period there was \$549.60, which he wiped out. In the account called, "Exploration" in the first accounting period there was \$207.22, which he wiped out. In the second accounting period there was \$53.67, which he wiped out.

In the account, "Subscriptions and donations" in the first accounting period \$49.99, which he wiped out.

In the second accounting period, \$45.61, which he wiped out.

Q. (Mr. Rosenberg): Would this be true——

A. General plant expense—we will finish this—General plant expense, in the first accounting period \$2009.25. He added \$18.99 to that. And in the second accounting period \$1974.29, and he added \$82.90 to that. So that the total general overhead, summarizing all of those adjustments in the first accounting period, he deducted \$549.30, and in the second accounting period he deducted \$748.91. The net result of all those adjustments seems to be that they wiped each other out, so that when you get through there is apparently no net adjustments per ton.

Q. They wiped each other out, these items which are all deductions except the \$18.99; what you mean is they were in such nominal amounts they did not affect the per ton amount?

(Testimony of C. Bruce Flick.)

A. Well, I would say that the tonnage is not identical in those two accounting periods, and it just so happened the computation per ton turned out to be the same. [404]

Q. (Mr. Rosenberg): The statement is correct that the work sheet shows we claim a seven cent increase for general overhead and on Mr. Bannard's sheet he likewise showed seven cents for general overhead.

A. Well, I don't like to call that "claims" in connection with the audit work sheet, Mr. Rosenberg.

Mr. Rosenberg: I said he showed——

A. He showed just what we have been describing here last.

Mr. Rosenberg: I made reference the other day to a letter, Your Honor. I would like to offer it in evidence. I will offer in evidence at this time, if Your Honor please, a letter dated November 24, 1947, which is a copy of a letter written on the stationery——

Mr. Bennett: Just a minute. Before you introduce it, counsel, I want to see it. I don't see the relevancy at the moment. May I ask before the Court rules on the admissibility of this particular document, one written on November 24, 1947, to Pillsbury, Madison & Sutro, a letter written after the suit was filed, Your Honor, may I ask counsel's purpose for the offer?

Mr. Rosenberg: Yes. The purpose is this, that in the course of colloquy between Court and coun-

(Testimony of C. Bruce Flick.)

sel the other day, the Court was inquiring as to what information had been furnished to Pacific and what information had been withheld, and the witness testified to the fact that he had prepared these blank [405] worksheets and that they had been submitted to the attorneys for the defendant and the information had been inserted on the sheets and then they were returned to the attorneys for the plaintiff, and this is merely the letter of transmittal, if the Court please, showing the circumstances and conditions under which those figures were furnished. It is a letter from my office to the defendant's office. I don't know what objection there should be to having it go in.

Mr. Kaapcke: I would like to make an explanatory statement or a preliminary statement in that connection, Your Honor. Mr. Rosenberg said his purpose was to show the conditions under which this transmittal was made. I don't want to go into the matter of these motions. I think we have talked about them at great length and there is no necessity to discuss them further, but this unilateral declaration which Mr. Rosenberg makes of the conditions on which he furnished this information is certainly not consistent with the facts and I am sure Mr. Rosenberg will not assert that at any time I told him that our receipt of this information would be conditioned upon our relinquishing any right to go into further or subsidiary data. As a matter of fact, I at all times, and I think that every conversation referred to the possibility to

(Testimony of C. Bruce Flick.)

preserve our rights to go into the underlying data if in the eventuality of other issues of this suit as they were framed were decided, it should be necessary for a further examination to be made. If the [406] record is to show this letter indicating the conditions that Mr. Rosenberg had in mind in transmitting this information, I believe the record should also show my statement of the basis upon which this information was requested from Mr. Rosenberg.

The Court: Did you write a letter in answer to it?

Mr. Kaapcke: No, I did not write a letter in answer to it, Your Honor. I would be very glad to if it had seemed necessary but it seemed unnecessary for me to engage in a running battle with Mr. Rosenberg as to what we had said at different conversations and this case was in preparation and it seemed to me that was a matter of no great importance at the time. It certainly did not require my engaging in dispute with him about it.

The Court: What is the difference between you now? Is there any doubt about the actual situation?

Mr. Rosenberg: I don't think so.

Mr. Bennett: Your Honor, what is the purpose of this letter? It is not evidence; it is a self-serving statement.

The Court: Well, in the interest of time I will allow the letter. Let's clear it up.

(Letter of November 24, 1947 to Pillsbury, Madison & Sutro was marked Defendant's Exhibit F in evidence.)

(Testimony of C. Bruce Flick.)

Mr. Rosenberg: This is a letter, the original was written on the stationery of Bacigalupi, Salinger & Elkus to Pillsbury, Madison & Sutro re this case, attention of Mr. Kaapcke. It is dated November 24, 1947: [407]

“Gentlemen:

“I am enclosing herewith one set of the accounting information compiled by Westvaco Chlorine Products Corporation on the form sheets submitted by Pacific Portland Cement Company.

“Inasmuch as this data was furnished on condition that it would satisfy your Motion for inspection, would you kindly inform the Clerk to take the Motion off the calendar and advise me when this has been done.

“Very truly yours,

“Claude N. Rosenberg.”

The Court: It is time for recess. We will take a recess.

(Recess.)

Q. (Mr. Rosenberg): Mr. Flick, in your deposition the other day I understood you to say——

Mr. Bennett: Deposition?

Mr. Rosenberg: In your testimony the other day I understood you to say that you were willing to concede that depreciation was a proper item to include in the cost of production of gypsum but you objected, if I understand you, to the method by which the depreciation was computed; is that right?

(Testimony of C. Bruce Flick.)

A. Yes, that is correct. May I, just before we proceed, I would like to clear up just one matter we were discussing just before the recess in connection with this work sheet, of Mr. Bannard, and before we leave that and get involved in other subjects. That work sheet did not purport to represent Mr. [408] Bannard's position with respect to the inclusion of items on those work sheets. I have already testified that Mr. Bannard approved the letter of November 4, 1946, which expressed our position. I just don't want to leave that under any misapprehension.

Q. Going back to depreciation again, as I understand it, your objection was to the use of the straight line method of depreciation; is that right?

A. That is correct.

Q. Now, were you informed at the time you made your examination of our records that the depreciation had been computed on a straight line basis ever since this plant was constructed in 1937?

A. I was told that the depreciation was on a straight line basis on January 14, 1944, by Mr. Cuneo, and I was also told that in general the accounting method had been followed since the outset.

Q. Then you were in effect informed that the depreciation had been computed on that basis ever since the plant was constructed in 1937; is that right?

A. Yes, that is what I was informed in effect.

(Testimony of C. Bruce Flick.)

Q. Then what is your position on that at this time? Are you suggesting that we make a change in that method and we should have changed to the method of computing depreciation somewhere along the line? [409]

A. What I have pointed out and tried to explain in some detail is that the straight line method of depreciation gives you a result where your tonnage fluctuates from one year to the next which may show an apparent or bookkeeping increase which is not an actual advance in the cost of manufacture.

Q. In understand the basis of your objecting, but assuming that that method of computing depreciation had been used by Westvaco ever since the plant was constructed in 1937 and then when you came to check the figures on cost of production of the period July, 1944 to June 30, 1945 as compared to July 1, 1945 to June 30, 1946, it would be your thought that we should change for the next period the method of depreciation charge that we had been using for a period of years before that?

A. My thought has always been that Westvaco should not apply for the purpose of computing actual advance in cost of manufacture accounting methods which were included in its national uniform accounting system, but that Westvaco should keep accounts for the purpose of the contract which would reflect actual advance in cost of manufacture.

Q. Having kept their depreciation charges on that basis for a period of seven years, then would

(Testimony of C. Bruce Flick.)

it be your view that for the purpose of your cost figures for 1944-'45 as compared to 1945-'46 they should use a different method?

A. I have said that in order to get a true comparison for any two twelve month periods the accounting method must be uniform [410] for those two twelve month periods. Now, I think what Westvaco should have done, let's take 1942-'43. I think they should have computed their depreciation on a production basis for 1942 and also for 1943.

Q. And had they done that, then they would have had to adjust all of their other depreciation accounts likewise, wouldn't they?

A. No, they would not have had to adjust any of their other accounts. They would only have had to make a computation for the accounts for the contract.

Q. I see. Now, with reference to these moisture credit deductions and having in mind particularly the sum of \$514 that Westvaco had been claiming for erroneous chargebacks from the period 1940 to '44 because of what you state was a clerical error made by a clerk, or clerical errors that were made by a clerk in your accounting department, when did you first learn about that situation?

A. I think that there is a confusion because the \$514 amount happens to be coincidental to one somewhere near, the other amount of \$525, or whatever it was, for which we tendered a check. I don't believe those two things are related, Mr. Rosenberg.

(Testimony of C. Bruce Flick.)

Q. Let me ask you when you first found out about the \$525 item.

A. I have already testified as to that. After the suit was [411] filed, Mr. Kaapcke was going over some questions with me and wondered whether we had made any deductions on account of impurities and——

Q. When was that that Mr. Kaapcke got in touch with you?

A. When was the suit filed, February? It was some time after the filing of the suit, as I remember it.

Q. Do you recall how long?

A. It is difficult to recall exactly. We were going over a lot of these things after the suit was filed.

Q. Do you recall having received a statement on December 31, 1946, for these chargebacks in the sum of \$514.91 covering the period from December 31, 1940 to September 8, 1944?

A. I had several statements on chargebacks and I repeatedly invited Mr. Wallace to show me any instances where he thought we were wrong and I said I would be glad to check it and if we were wrong that we would make it right.

Q. Was it in pursuance to that declaration that on December 31, 1946 you were sent a statement showing these chargebacks in the sum of \$514.91 for the period I just mentioned?

Mr. Bennett: Well, that has to do with an entirely different matter.

(Testimony of C. Bruce Flick.)

Mr. Rosenberg: No, it does not. It includes chargebacks that you have taken where the gypsum content was 95.51 per cent or more——

Mr. Bennett: Well, if you have a letter, why not show it [412] to the witness?

The Witness: I have had various statements and assertions from Mr. Wallace during the latter part of 1946 and I had asked him repeatedly to show me where we were wrong and I would be glad to check it and correct it.

Mr. Rosenberg: I will skip that for the time being.

Mr. Bennett: Well, I have no objection to the letter.

Mr. Rosenberg: Well, that's all right. I will skip it for the time being.

Mr. Bennett: I think that refers to an entirely different matter.

Mr. Rosenberg: Well, it does not, Mr. Bennett; I am quite sure.

Q. With reference to shipping expense, if I understand your testimony that you gave the other day, you conceded that direct shipping expenses would be a proper item to include in the cost of production but you object to indirect shipping expense; is that correct?

A. That is substantially correct. I pointed out the cost of production, if you want to be strict about the word, cost of manufacture does not include shipping, but in so far as we were concerned under the contract with a price f.o.b. cars that we

(Testimony of C. Bruce Flick.)

were quite willing to say that that is included in the term cost of manufacture, the cost of putting it on the cars. I was quite willing to accept the direct charge as being [413] shipping cost of getting that gypsum onto the cars, but we are not willing to accept charges which represent theoretical allocations of so-called indirect shipping expense; for example, demurrage.

Q. Well, I take it that your answer to my question is yes, is it, that you concede that direct shipping expense may properly be included but you dispute that indirect shipping expense may be included? A. Correct.

Q. Will you explain to the Court what you mean by indirect shipping expense?

A. I am referring to the Westvaco, what Westvaco calls indirect shipping expense. Westvaco included in indirect shipping expense demurrage, shipping foreman, shipping foreman assistant, shipping clerk, warehouse labor, allocating tractor expense, labor for tractors.

Q. In other words, those are expenses that occur in the conduct of a shipping department but which can't be directly allocated to the various products that are being handled in the shipping department; is that true?

A. All I can say is their shipping expenses which have been allocated to gypsum formerly on the basis of the sales value of the gypsum in ratio to the sales value of other products shipped, and in the latest accounting period Westvaco changed

(Testimony of C. Bruce Flick.)

the method to allocate on the basis of tonnage. [414]

Q. I will ask you the question again. Is it correct that those are expenses which occur in the operation of a shipping department but which are allocated to various products handled because you can't charge them directly because you don't know how the time or the expense is directly divided as between the various products handled; isn't that correct?

A. I think that you have stated what Westvaco did.

Q. No. I am not asking you what Westvaco has done. I am asking if that is true. Is that true? Let me put it this way: If you have a shipping department and you have a number of employees in that shipping department and one of the employees is the superintendent of the shipping department and you are handling various products out of that shipping department, you would consider the superintendent's salary as an indirect expense because you don't know how much time he puts in in supervising the work in connection with a particular product; isn't that right?

A. You don't know how much time he puts in in shipping the by-product gypsum and therefore you should not allocate on a theoretical basis to the by-product gypsum.

Q. Let me ask about Gerlach, Nevada. You have a shipping department there.

A. Yes, four joint products.

Q. And you handle four joint products?

A. Yes. [415]

(Testimony of C. Bruce Flick.)

Q. And you have a superintendent or a foreman of your shipping department?

A. Correct.

Q. His expense is allocated as between the four products that are handled at the shipping department; is that it?

A. Correct.

Q. The reason for that is you don't know how much time he puts in in connection with the shipping of and supervision of each particular product; is that right?

A. That is correct.

Q. Let's assume that we had a separate shipping department for what you call by-product gypsum and we only handled gypsum in it. Then the superintendent's salary would be a direct charge rather than an indirect charge?

A. If he spent his time on the by-product gypsum and nothing else, I wouldn't object to it.

Q. You would not object to that?

A. No.

Q. You would not object to the assistant foreman if in a shipping department that was devoted exclusively to the shipping of gypsum you had a superintendent and a foreman, then their salaries would be direct expense and there wouldn't be any question that they would be properly included in shipping expense?

A. Yes, that is correct. That is entirely in line with what I [416] have said about by-product gypsum.

Q. So if I understand you, the basis of your objection, it is not that these charges are not really

(Testimony of C. Bruce Flick.)

and actually charges in connection with the operation of a shipping department, but because they took the allocations on the same basis, that is the basis of the objection?

A. If you discontinue shipping by-product gypsum, you would still have these charges for the assistant foreman and the others in a lesser and unascertainable amount and they should not be charged to the shipping of the by-product gypsum.

Q. In your Gerlach plant if you discontinued shipping or manufacturing any of these four products you make, you would still have your general expense of your shipping department either in the same amount or in some lesser or unascertainable amount; is that correct?

A. You would have your three remaining joint products.

Q. It is equally true, is it not, that in your Gerlach plant if you were handling four products and you discontinued the manufacture of a particular product you would still have a general expense and miscellaneous shipping expense or similar expense that you had before except that it might be less in amount, unascertainable amount, isn't that true?

A. Yes. That is not necessarily the difference between four products and by-products.

Mr. Bennett: Counsel, may I ask a question? Is it your [417] contention—

Mr. Rosenberg: You know, every time I have interrupted you you have objected, Mr. Bennett, but I have not objected. What is the question?

(Testimony of C. Bruce Flick.)

Mr. Bennett: I thought we would save time on all this testimony. I want to know whether it is your position that under accounting principles the same method should be used in accounting for by-products as is used for accounting for primary or main products.

Mr. Rosenberg: It is my contention that where you are handling a number of products in a shipping department, whether they are main products or a by-product, if you are going to determine the cost of shipping out a by-product, you do it upon the same sound principles as you do in any of the major products, that you do not saddle other products with the expense of a by-product. There is no magic in the term by-product. You have to pay your foreman to handle a by-product the same as you do a main product. Where you have a physical plant that handles the processing of a by-product and the shipping of the by-product, your expenses are there. There is no magic whether you call a by-product a main product or a main product a by-product. As I said the other day, where is the rationale, the philosophy, the logic of changing these accounts and real expenses merely by the magic of applying to the product the term by-product and saying it is not proper to apply these [418] expenses, they are not proper costs because you call it a by-product. Does that answer your question?

Mr. Bennett: As I understand your rather lengthy argument, it is yes, that you do not see any distinction or difference between cost account-

(Testimony of C. Bruce Flick.)

ing of a by-product and cost accounting of a main product.

Mr. Rosenberg: I don't draw any distinction between the cost accounting for gypsum in this complaint as related to bromine or any of the other 30 or 40 magnesia products that we make. [419]

Q. Mr. Flick, as you have stated before, you visited the plant over in Newark, is that correct?

A. Yes.

Q. Is this true, that the operation over there is largely an automatic operation: Most of the processes are handled by machinery, is that true?

A. I think that is true. It is quite well mechanized.

Q. What experience have you had in chemical plants? Have you had any actual experience in accounting for a chemical industry?

A. I have never been employed by a company that you would describe as a chemical company.

Q. Do you understand that is a common situation in chemical plants, that the operations are more largely automatic than in most manufacturing processes?

A. No, that is not unique with the chemical industry.

Q. Is this true, that in an industry where your manufacturing processes are largely automatic, as distinguished from manual, you would reasonably expect the indirect charges and overhead expense to bear a larger proportion or relation toward the total cost of production than you would in a process

(Testimony of C. Bruce Flick.)

where the manufacturing is largely labor or manual? That is obvious, isn't it?

A. Not necessarily, at all.

Q. Is it not?

A. No. If you mean by "indirect," if you include depreciation, [420] if you have a plant like a cement plant, which requires a great deal of heavy machinery and heavy capital investment, naturally you are going to have quite a large depreciation item, and repair and maintenance item, but the question of general overhead depends on lots of factors. It may depend, for example, on whether you have a type of business where you can sell in carload lots as compared with where you have to pack something and sell it in smaller lots, pack it in tin cans or maybe cases. There are lots of factors that may influence that. It depends altogether on the particular situation.

Q. Yes, but wouldn't you say as a general proposition that in a manufacturing process, where it is largely manual and therefore direct labor, you would have a larger percentage of your cost of production represented by direct charges than you would in a process that is essentially automatic? Do you disagree with that as a general proposition?

A. Well, I am afraid I cannot go along with a general proposition, because, I guess, it all depends on what you are making and the circumstances under which you are making it. I do not quite see the point of it.

(Testimony of C. Bruce Flick.)

Q. Let me ask you this: Among the items which Westvaco includes in overhead expense is laboratory and process control, is that right?

A. Yes.

Q. You feel that those are not proper charges to include in cost [421] of production do you?

A. I feel that you should not charge by-product gypsum any allocated portion of your laboratory or so-called process control, because if you quit making the by-product and dumped it in the bay, you would still have your laboratory and process control.

Q. And that would be true if we discontinued making one of our other products, too, wouldn't it?

A. Well, if you discontinued making magnesium oxide?

Q. Yes.

A. You would have no gypsum production.

Q. We would not? A. Would you?

Q. I do not know. You are the witness, Mr. Flick, and you are telling me. Wouldn't we?

A. Well, I am not going to tell you what we might have.

Mr. Rosenberg: I suggest that the remark be stricken, if your Honor please.

The Court: It may go out.

Q. (Mr. Rosenberg): Let us take your Gerlach plant again. If you were conducting a laboratory over there for testing your products or improving your processes and you discontinued making one of the four products, you would continue to have your laboratory, wouldn't you?

(Testimony of C. Bruce Flick.)

A. Certainly.

Q. And those are joint products, aren't they?

A. Correct. [422]

Q. Were you informed that one of the functions of this laboratory is to make these tests of gypsum for the purpose of determining the gypsum content under the terms of the contract?

A. I assume that that is one of the functions.

Q. Is it your position that that is not a proper expense to include in the cost of producing the gypsum?

A. If you can actually ascertain what cost is incurred to test the gypsum, I would even be willing to admit that, although it is not strictly part of the cost of making the gypsum, manufacturing the by-product. But where you take your laboratory cost and then you assign a percentage of it to gypsum, merely because the gypsum labor payroll bears a certain relation to the total labor payroll, that is a purely hypothetical and theoretical allocation and is not properly good by-product accounting.

Q. But if you could get yourself to conceive that gypsum is a joint product rather than a by-product, then you would concede that that would be a proper charge, wouldn't you?

Mr. Bennett: It seems to me, your Honor, we are getting far afield here. This contract specifically states, your Honor, that it is a by-product, and a by-product, incidentally, resulting from the manufacture of the primary product. When that contract used those terms, we were entitled from

(Testimony of C. Bruce Flick.)

the life of the contract to understand the term "cost of manufacture of the by-product" to be the meaning which is commonly attributable to that. I do not know why we constantly get afield here on something else. I do not know whether counsel's purpose is to show that despite the contract declaration as to the character of the product, it is something else, and if that is his purpose I say it is all inadmissible, because he is bound by the contract and it would be asking the court not to construe the contract but to change it, and it seems to me we are getting far afield when we are dealing constantly with other situations. Now, if there is some purpose, counsel, to be served, other than an improper purpose of trying to establish that this is not a by-product, as the contract specifically states it is, why, I have no objection, assuming the court is willing to take as much time as you wish with this witness. But if the purpose is to establish that this is something other than a by-product, then I submit the defendants are bound by the express, unequivocal language of the contract, your Honor.

Mr. Rosenberg: I think I have stated my position. My position is clearly this, that whether or not gypsum is a by-product, from the chemical viewpoint, from an accounting standpoint it is entitled to the same accounting treatment as if it were a joint product. So I want to get this witness' views on what is proper accounting for a joint product.

The Court: Proceed.

Mr. Rosenberg: Will you read the question, Mr. Reporter?

(Testimony of C. Bruce Flick.)

(The last question was read by the reporter.)

Q. (Mr. Rosenberg): I am talking now about a portion of the [424] laboratory expense that is devoted to testifying the products, the proving processes, and things of that character.

A. If you had joint products, for your own purposes you can allocate on any basis you please. Where you have a contract involving somebody else, you have a different problem. The basis of allocation, even for your own purposes, should make sense, and you should not allocate merely for the sake of arithmetical convenience on one basis without relation to the nature of the thing you are allocating.

Now, laboratory expense allocated on a labor payroll basis does not make sense, unless you can establish that there is some relationship between the dollar of the labor payroll and the dollar spent in the laboratory.

Q. Would you say that allocation of laboratory expense on the basis of direct labor charges in the laboratory as related to total labor charges in the laboratory would be a rational basis of allocation?

A. If you keep track of the time of the chemists in the laboratory, then you no longer have any allocation problem, but you have a direct charge that you can make. You can ascertain that.

Q. Let us say when chemists work directly on a certain product, that they keep track of their time, and then when they are working on chemical processes generally in the plant, those charges are al-

(Testimony of C. Bruce Flick.)

located on the basis of the relation between the direct time [425] spent on a particular product, as related to the whole: Would you say that that would be rational?

A. Where you are talking about processes in the plant, there again you have a question of what processes and how they are related to the point of separation of your by-product or your joint products, for that matter.

Q. Let me ask you this, Mr. Flick, then: If I understand you, your objection to this charge is on the basis that it is allocated, is that right, rather than being direct?

A. Are you asking me as to joint products, or as to by-products?

Q. Let us assume that it is a joint product.

A. Joint products.

Q. Yes. Now, I will withdraw that. I believe you went so far as to concede that if we would have an accurate check on the time that is spent in analyzing and testing gypsum and working on the gypsum process to improve it, or to remove bugs, you would concede that that would be a proper charge?

A. You no longer have an allocation then. You have an ascertained direct charge.

Q. I did not say we had any allocation. I am speaking of a direct charge, now.

A. Correct.

Q. You would concede that that would be a correct charge, would you? A. Correct. [426]

Q. Laboratory? A. Correct.

